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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AVARETTE M. EBERWIEN, S/K/A
AVERETTE M. EBERWIEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virgina

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court erred in refusing to allow the petitioner to put on evidence that the murder for which he was charged was committed by another (Curtis Sprenkle).

LIST OF PARTIES

The petitioner is Avarette M. Eberwien, S/K/A Averette M. Eberwien, was the defendant in the trial court. The Commonwealth of Virginia is the respondent.

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PETITION FOR WRIT OF CERTIORARI

Avarette M. Eberwien, S/K/A Averette M. Eberwien (Eberwien), respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The Supreme Court of Virginia, on February 21, 1996, refused the Petition for Appeal filed by Eberwien affirming the judgment of the Court of Appeals of Virginia. An opinion was filed by the Court of Appeals of Virginia on November 14, 1995 (Record No. 0671-93-2), which was an unpublished opinion, affirming the Circuit Court of the County of Hanover, judgment of April 5, 1993.

JURISDICTION

The Court of Appeals of Virginia issued its order of November 14, 1995 (App. 1a), affirming the judgment of the Circuit Court of Hanover County, Virginia, of April 5, 1993. (App. 11a). Eberwien filed a timely Petition for Appeal to the Supreme Court of Virginia on December 12, 1995. The Supreme Court of Virginia refused the Petition for Appeal after consideration of the arguments submitted thereof in support of the Petition on February 21, 1996. (App. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

AMENDMENT V

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Facts of the Instant Case and Proceedings Below

The petitioner was charged in Hanover County, Virginia, with the murder of his wife and the use of a firearm in the commission of a felony. The defense intended to introduce evidence that the crime might have been committed by an individual by the name of Chris Sprenkle ("Sprenkle"). The Commonwealth filed a motion *in limine* on January 25, 1993 (App. 14a), and argument was heard in support of the Commonwealth's motion on January 26, 1993. The Commonwealth called in support of its motion Investigator Stanley H. Kirks ("Kirks") as its witness. The objective of the Commonwealth's motion *in limine* (App. 14a) was to prevent the defense from introducing evidence that someone other than Eberwien committed the murder, specifically naming Sprenkle. The Court, after hearing evidence and argument of counsel, ruled in favor of the Commonwealth and prohibited Eberwien from putting on this defense before the jury. The defense noted its objections and exceptions to the trial court's rulings both at the hearing and on the first day of the jury trial before the jury was empaneled when the defense again readdressed the point and provided additional evidence in support of its position. The defense proffered testimony as to what evidence would be produced regarding Sprenkle.

Eberwien was denied his constitutional right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, and further denied under the Sixth Amendment to effective assistance of counsel.

The petitioner appealed his case to the Court of Appeals of Virginia and was granted a writ. The Court of Appeals of Virginia, after reviewing Briefs and hearing argument of both sides affirmed the verdict of the trial court by order dated November 14, 1995 (App. 1a). The petitioner appealed the decision of the Court of Appeals of Virginia to the Supreme Court of Virginia and raised as an assignment of error the denial of the petitioner's constitutional rights under the Fifth, Fourteenth, and Sixth Amendments of the United States Constitution in the denial of evidence which was to be presented on his behalf. The Supreme Court of Virginia, by order dated February 21, 1996 (App. 13a), refused to hear the petitioner's case prompting this writ of certiorari.

B. Supreme Court of Virginia and the Court of Appeals of Virginia Decisions

The Court of Appeals of Virginia denied the appeal of Eberwien on November 14, 1995 (App. 1a), and filed an opinion (Record No. 0671-93-2), which is unpublished. The Supreme Court of Virginia refused the Petition for Appeal of the petitioner on February 21, 1996 (App. 13a), stating it had reviewed the record in the case and considered argument submitted in support of granting an appeal.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA'S DECISIONS ARE PLAINLY ERRONEOUS AND EVISCERATE THE PROTECTION CONGRESS AFFORDED INDIVIDUALS BY THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Supreme Court of Virginia and the Court of Appeals of Virginia's ruling that refused to allow Eberwien to introduce evidence that someone else committed the murder was erroneous.

The defense intended to put on evidence that the crime might have been committed by an individual by the name of Chris Sprenkle. The Commonwealth's Attorney objected to that tendered evidence and filed a motion *in limine* (App. 14a) asking the Court to rule that the defense could not present that evidence. The hearing on the motion *in limine* was held before Judge R. C. Taylor on January 26, 1993 (*see* App. 23a starting at App. 25a). It is unrebutted and it is in the record that the defense intended to put on evidence that Mr. Sprenkle was a known murderer both in and out of the State of Virginia (App. 26a), and that he was in the Commonwealth of Virginia at various times and at various locations prior to the death of Alice Eberwien on January 14, 1992 (App. 26a). Additionally, the defense was prepared to show that Mr. Sprenkle was an individual who broke and entered into homes (App. 26a), that he was a known killer, having killed his brother here in the Commonwealth of Virginia (App. 26a, 27a), and then having killed a person in the State of Arizona (App. 26a). The defense was further prepared to show that Mr. Sprenkle was killed in he State of Illinois, and that when he was killed, he was in the possession of a sawed-off shotgun (and, of course, the evidence was and is in the Eberwien case that it was a sawed-off shotgun that killed Mrs. Eberwien, but was never found). The defense was fur-

ther ready to show that Mr. Sprenkle was known to have lived in a house in the Gilpin Court area of Richmond, Virginia (App. 28a), and that a Richmond police officer would testify (when called by the defense) that when he responded to the address in Gilpin Court, he found two sawed-off shotgun barrels at that residence. One was a single barrel and one was a double barrel (App. 28a). Oddly enough, it was through the Commonwealth's investigation of the Eberwien murder and through the discovery filed by the defense, that the defense found that the Commonwealth, in attempting to discover if there were any possible persons who could have shot Alice Eberwien on that night, came across an individual who left town just prior to that murder who had sawed-off shotguns and it was Mr. Sprenkle (App. 29a). Additionally, the defense was ready to prove that Mr. Sprenkle was a resident of Hanover County, the place of Mrs. Eberwien's murder, and, in fact, had even been sentenced in the Hanover Circuit Court by Judge Taylor (the trial Judge in the Eberwien case) regarding previous crimes (App. 30a). The Commonwealth was so worried about this evidence that it called Investigator Stanley H. Kirks as its witness regarding this motion *in limine* hearing (App. 34a). Investigator Kirks is with the Hanover County Sheriff's Department and investigated Mr. Sprenkle regarding his potential connection with the Eberwien killing. Mr. Kirks even interviewed the woman who was accompanying Mr. Sprenkle in his killing sprees across the country and Mr. Kirks said that there came a point in time when they (Sprenkle and his girlfriend) were back in Hanover County (App. 36a). He interviewed this lady (App. 36a). She said that they (herself and Mr. Sprenkle) left Hanover County at approximately 5:00 o'clock in the morning on January 13, 1992, headed on Interstate 95 southbound (App. 37a). It was brought out on cross-examination by the defense, however, that this lady (Ms. Donovan) did not tell Officer Kirks where she and Sprenkle were on January 14, 1992 (App. 42a)

(the date of the Eberwien murder). It was brought out through Officer Kirks that Sprenkle was involved in at least twelve burglaries in and around this area (App. 38a), and that it was true that Officer Kirks investigated and reported that a Richmond Police Officer on January 13, 1992, found a number of sawed-off barrels from shotguns left by Mr. Sprenkle in the Gilpin Court, Richmond, Virginia apartment (App. 41a). It was additionally discovered through Officer Kirks (at App. 44a) that Mr. Sprenkle, at or about the time of the Eberwien murder, was driving a red Chevrolet S-10 pick-up truck (App. 44a). It was further discovered that Mr. Sprenkle wore facial hair (App. 48a). This becomes important, because during the trial the black ski mask that the intruder was wearing was found somewhere across the street from the Eberwien house and it contained beard or mustache facial hair from a Caucasian that could not be identified as Mr. Eberwien's (Mr. Eberwien does not wear a beard or mustache (*see* App. 67a, 73a) regarding Commonwealth witness Elmer Gist, Jr., Hair and Fiber Expert).

Notwithstanding the above representations of counsel as to what the defense intended to establish and notwithstanding the fact that much of it had been established through Officer Kirks, the Court sustained the Commonwealth's motion *in limine* and refused to allow the defense to put this evidence on before the jury (App. 48a). That, of course, was at the motion *in limine* hearing on January 26, 1993. On the morning of the trial of February 2, 1993, the defense re-addressed the point at App. 64a-66a and stated to the Court (App. 64a) that since the motion *in limine* hearing, the defense obtained a witness, who on the afternoon of the homicide could place a red pick-up truck with white stripes or a white pick-up truck with red stripes outside the Eberwien residence across the road (the color truck Sprenkle was driving at or about the time of the Eberwien murder—App. 44a). Based on that additional evidence, the de-

fense asked the Judge to reverse his ruling on the motion *in limine* and allow the defense to put that evidence on before the jury. The Court again refused and would not allow the defense to put on its defense (App. 66a).

It is respectfully suggested that the trial court erred in not allowing the defense to put on its defense, regardless of how weak the Court might have thought the defense. It is not up to the Court in a jury trial to make the determination of the weight to give any evidence. That is what the jury decides. Certainly, the defense could have argued the fact that this known mad killer was in the neighborhood at or about the time that Mrs. Eberwien was killed and that there was a breaking and entering, which was this man's mode of operandi, and that there was a killing with a sawed-off shotgun, which was this man's mode of operandi, and that there was a pick-up truck of similar description that he was driving found in the general area of the Eberwien house on the day of the murder. Surely, all of that is good defense work and should have been heard by the jury and the jury should have been allowed to put whatever weight they wanted to put on that evidence. That, of course, was not allowed by the trial Judge and it is reversible error, and a new trial should be ordered allowing the defense to put on whatever defense it wants to put on. In not allowing the defense to put on its defense, the trial court has denied the defendant his 5th and 14th Amendment rights to a fair trial and his 6th Amendment right to effective assistance of counsel.

" 'In Virginia, evidence that a crime was actually committed by someone other than the accused is admissible for the purpose of generating a reasonable doubt of the guilt of the accused.' " (*Weller v. Commonwealth,* 16 Va. App. 886, 890 (1993); Charles E. Friend, *The Law of Evidence in Virginia,* Section 150 (3d ed. 1988). Further, in the *Weller* case, the Court cited *Karnes v. Commonwealth,* 125 Va. 758, 766, 99 S.E. 562, 565

(1919), "[t]he evidence introduced must point directly to guilt of a third party." *Id.* Thus, where there is a trend of facts and circumstances tending clearly to point out some other person as the guilty party, the [defendant] may introduce any legal evidence which is available tending to prove that another person committed the crime with which he is charged." *Weller* further states, "although circumstantial evidence tending to prove the guilt of a third party is to be liberally received, *id.*, the evidence must be legally admissible." *Weller* at 890. The evidence was relevant and material and should have been admissible.

II. THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA DECISIONS THREATEN THE DECISION-MAKING PROCESS THAT CONGRESS SOUGHT TO PROTECT

The issue raised by this petition is of grave importance. The Supreme Court of Virginia and the Court of Appeals of Virginia strike at the heart of Congress' procedural safeguards enunciated in the United States Constitution in affording an individual a fair trial—a trial where the defendant can present evidence to a jury that supports his innocence. The petitioner was denied his due process rights to a fair trial. He was not able to defend himself against the State's accusations.

III. THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA'S DECISIONS CANNOT BE RECONCILED WITH OTHER DECISIONS, INCLUDING CONTROLLING AND DIRECTLY CONTRARY HOLDINGS OF THE UNITED STATES SUPREME COURT

The Supreme Court of Virginia and the Court of Appeals of Virginia's decisions cannot be reconciled with *Chambers v. Mississippi*, 410 U.S. 284 (1973). *Chambers* expressly holds that the constitutional guarantee of due process "is, in essence, the right to a fair opportunity to defend against the State's accusations." *See Chambers*,

410 U.S. App. 294. The exclusion of the critical evidence involving Sprenkle denied Eberwien a trial in accord with traditional and fundamental standards of due process.

Under the Federal Rules of Criminal Procedure, Rule 402 recites:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Act of Congress, by these Rules, or by other Rules prescribed by the Supreme Court pursuant to statutory authority."

Evidence which is not relevant is not admissible. The Federal Rules of Criminal Procedures provides that a function of a criminal trial is to seek out and determine the truth or falsity of charges brought against the defendant, and proper fulfillment of such function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it was obtained compels formulation of a Rule excluding its introduction. *Lopez v. U.S.*, Mass. 1963, 83 S.Ct. 1381, 373 U.S. 427, *rehearing denied,* 84 S.Ct. 26 (1963).

The Law of Evidence in Virginia as cited by Charles E. Friend, (4th Ed. 1993), Section 11-2 on relevance and admissibility, states:

> "That evidence may be admitted even if, standing alone, it does not appear to be relevant. . . [W]hile a single circumstance, standing alone, may appear to be entirely immaterial and irrelevant, it frequently happens that the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion." *Peoples v. Commonwealth,* 147 Va. 692, 704, 137 S.E. 603, 606 (1927).

The test of relevancy is not whether the evidence conclusively proves a point, but whether it tends to support the desired proposition.

> "It is admissible if it . . . constitutes a link in the chain of proof although, alone, it might not justify a verdict. . . ." *McNeir v. Greer-Hale, Chinchilla Ranch*, 194 Va. 623, 628, 74 S.E.2d 165, 169 (1953).

Eberwien was not given the opportunity to defend against the State's accusations, because the trial court refused to allow the jury to hear the heart of the defense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May —, 1996

APPENDICES

APPENDIX A

COURT OF APPEALS OF VIRGINIA

Present: Judge Benton, Senior Judge Cole
and Retired Judge Trabue*
Argued at Richmond, Virginia

Record No. 0671-93-2

AVARETTE M. EBERWIEN, S/K/A
AVERETTE M. EBERWIEN

v.

COMMONWEALTH OF VIRGINIA

From the Circuit Court of Hanover County
Richard H.C. Taylor, Judge

MEMORANDUM OPINION **
BY JUDGE KENNETH E. TRABUE
November 14, 1995

Averette M. Eberwien (Eberwien) appeals his convictions for first degree murder and use of a firearm in the commission of a felony. Eberwien contends that the trial

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* Retired Judge Kenneth E. Trabue took part in the consideration of this case by designation pursuant to Code § 17-116.01.

** Pursuant to Code § 17-116.010 this opinion is not designated for publication.

court erred (1) in granting the Commonwealth's pretrial motion to exclude testimony which Eberwien contends the admission of which would have shown that another person committed the murder; (2) in denying Eberwien's motion for a continuance when the prosecution presented new demonstrative evidence; (3) in refusing appellant's jury instruction regarding circumstantial evidence; and (4) evidence presented at trial was insufficient to sustain Eberwien's murder conviction. For the reasons stated below, we affirm.

I. Factual Background

On January 5, 1992 Eberwien told his wife's sister and her sister's boyfriend that it would be inexpensive to hire a "hitman." Three days later, in the presence of Eberwien's stepson, Eberwien and his wife discussed the possibility of divorce and the division of marital property, although neither had filed for divorce at that time. During this meeting Eberwien told his wife that he could have her murdered the next day, but that in order to do so he would have to make it appear as though it was a burglary. The wife responded to this by saying that she had made arrangements to have any demise investigated.

On January 15, 1992, the Hanover County police received a call from Eberwien that an intruder wearing a black ski mask shot his wife in their home in the Rockville area of Hanover County. Eberwien told the police that the intruder killed his wife, then beat him across the back and fled. When the police arrived at Eberwien's home, they found his wife lying dead on the floor with a gunshot wound to the head.

When the police questioned Eberwien, he told them that he met an intruder in the hall, and that the intruder made him and his wife crawl on their hands and knees throughout the house to check each room. Eberwien had told the police dispatcher he spoke with earlier that he was walking through the hall when the intruder emerged from

the den holding Mrs. Eberwien. Eberwien spoke with other officers at the scene as well, and gave several different versions of events. At trial, officers testified that when they arrived at the murder scene, Eberwien's pants were not scuffed or dirty, nor did he show any signs of physical injury except a slight scratch on his hand. When Eberwien was taken to the hospital for examination, the hospital reported that there were no visible signs of injury.

Eberwien also told police that the intruder made him and his wife lie down on the floor next to one another and that the intruder then shot his wife. However, the gunshot wound to the victim's head caused a large spray of blood and body tissue across the floor where Eberwien claimed to have been lying. A blood spatter pattern analysis expert testified that someone lying where Eberwien claimed to have been lying would have been covered in the victim's blood and brain matter. Police testified that Eberwien's clothing did not appear to have any blood stains with the exception of some blood stains on his sleeve, which an expert in forensic serology and fabric separation testified is consistent with the backspray of blood resulting from firing upon a body at close range.

The day following the murder, a state police officer and a trained dog made a thorough search of the area surrounding the murder scene and were unable to find any evidence pertaining to the murder. However, the following day the victim's brother and a friend searched the same area and discovered a black ski mask lying in plain view near the road leading to the house. Forensic experts testified at trial that there was no interchange of fibers between the ski mask and the house, victim or Eberwien.

II. Pretrial Motion To Exclude

Eberwien contends that the trial court erred in granting the Commonwealth's pretrial motion to exclude evidence which he alleged tended to show that the murder may have been committed by Chris Sprenkle. The Commonwealth made a motion *in limine* to exclude all evidence pertaining to Sprenkle, which the trial court granted. The defense had intended to present evidence that Sprenkle, who had subsequently died, was a known burglar and murderer and that he was in the area prior to the murder. In addition, Eberwien wanted to present evidence that Sprenkle owned sawed-off shotguns and that around the time of the murder, Sprenkle was driving a red pickup truck and wore facial hair. Eberwien contends that these facts were relevant because a witness saw a red and white pickup truck near the murder scene on the day of the murder and because the ski mask found near Eberwien's house contained facial hair that could not be matched with Eberwien.

In support of its motion, the Commonwealth presented evidence that Sprenkle had left Virginia several days prior to the murder. An expert for the Commonwealth testified as to Sprenkle's *modus operandi* in previous burglaries and murders and stated that he could find no connection between Sprenkle's known crimes and the Eberwien killing. In addition, the Commonwealth presented evidence that the hair samples taken from Sprenkle were not consistent with any hair found on the ski mask, and defense counsel agreed with this assertion. Also, evidence at the hearing indicated that Sprenkle's sawed-off shotgun was not the weapon that fired the shell used in murdering Alice Eberwien.

In Virginia, evidence that a crime was committed by someone other than the person accused of that crime is admissible for purposes of generating a reasonable doubt regarding the guilt of the accused. *Weller v. Common-*

wealth, 16 Va. App. 886, 890, 434 S.E.2d 330, 333 (1993). However, the evidence introduced must point directly to the guilt of the third party, and the admissibility or circumstantial evidence tending to prove the guilt of the third person is left to the discretion of the trial court. *Id.* Here, Eberwien did not offer any evidence whatsoever linking Sprenkle to the murder. In fact, all of the evidence presented at the pretrial hearing indicated that it was not Sprenkle who committed the murder. Thus, the trial court did not abuse its discretion in refusing to admit testimony concerning Sprenkle.

III. Denial of Continuance

Eberwien contends that it was reversible error for the trial court to refuse his motion for a continuance when, the day before trial, the prosecution provided the defense with a blood spatter diagram that differed from the diagram provided to the defense during discovery. After the murder, the Commonwealth's expert prepared a blood spatter diagram showing a two hundred degree arc of blood spray from the victim. Later, this expert revised the diagram to indicated a two hundred and seventy degree arc of blood spray. When the Commonwealth attempted to introduce this latter diagram into evidence, Eberwien asked the court that either the new chart not be allowed into evidence or that the court grant a continuance so that his expert could evaluate the new diagram. The court denied the request for a continuance and allowed the more recent diagram to be admitted.

Whether a continuance should be granted or denied is a matter within the sound discretion of the trial court, and a decision one way or the other will not be disturbed on appeal in the absence of a showing that discretion has been abused. *Thomas v. Commonwealth*, 244 Va. 1, 13, 419 S.E.2d 606, 612, *cert. denied*, —— U.S. ——, 113 S. Ct. 421 (1992). Admission of items of demonstrative evidence to illustrate testimonial evidence is also a matter

within the sound discretion of a trial court. *Mackall v. Commonwealth,* 236 Va. 240, 254, 372 S.E.2d 759, 768 (1988), *cert. denied,* 492 U.S. 925 (1989). Furthermore, we cannot find an abuse of discretion unless Eberwien's case was prejudiced in that he was denied the opportunity to present material evidence. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Robinson v. Commonwealth,* 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986) (citation omitted).

Eberwien has failed to establish that he was prejudiced by the admission of the second diagram. The evidence was introduced for demonstrative purposes only, and the real evidence did not change. While Eberwien proffered that his expert witness wanted additional time to review the second overlay, there is no evidence in the record showing that Eberwien's expert could present evidence rebutting that of the Commonwealth's expert based on the first diagram. Furthermore, Eberwien was able to present the first diagram showing the two hundred degree arc of blood spray in order to impeach the accuracy of the Commonwealth's second diagram. "An appellant must demonstrate that the excluded evidence is relevant and material and that the party was entitled to have it introduced in order to establish on appeal that the trial court erred by excluding it." *Toro v. City of Norfolk,* 14 Va. App. 244, 254, 416 S.E.2d 29, 35 (1992). Thus we find that the trial court did not abuse its discretion in denying Eberwien's motion for a continuance.

IV. Jury Instruction

Eberwien further contends that the trial court erred in refusing his jury instruction regarding circumstantial evidence. Eberwien requested the following instruction: "There is no stronger presumption afforded than that an accused is presumed innocent, which cannot be over-

thrown except by proof of his guilt beyond a reasonble doubt. Where inferences are relied upon to establish guilt, they must point to the guilt so clearly that other conclusions would be inconsistent therewith." Eberwien took this language from *Moran v. Commonwealth*, 4 Va. App. 310, 314, 357 S.E.2d 551, 553 (1987), and we have more recently used the same language in *McQuinn v. Commonwealth*, 19 Va. App. 418, 427, 451 S.E.2d 704, 709 (1994) (Judge Benton, dissenting), *aff'd on reh'g en banc*, 20 Va. App. 753, 460 S.E.2d 624 (1995), and *Person v. Commonwealth*, 10 Va. App. 36, 38, 389 S.E.2d 907, 909 (1990). However, in each of these cases the court was expounding a principle of law, not instructing a jury.

Though this language explains the relevance of circumstantial evidence, Eberwien was not entitled to have it presented as a jury instruction. Parties are entitled to appropriate instructions on the law relevant to their case. *Banner v. Commonwealth*, 204 Va. 640, 133 S.E.2d 305 (1963). However, "when one instruction correctly states the law, multiple instructions upon the same legal principle are undesirable." *Tuggle v. Commonwealth*, 228 Va. 493, 508, 323 S.E.2d 539, 548 (1984), *cert. granted and vacated on other grounds*, 471 U.S. 1096 (1985). In this case, the court already chose to grant the Commonwealth's instruction from the *Virginia Model Jury Instructions*: "When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not suffiicent that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole must exclude every reasonable theory of innocence." This instruction fully elucidated the legal principle involved, and there was no need to substitute Eberwien's suggestion. The court's refusal to grant instructions on a legal principle already fully covered by other instructions is not an abuse of discretion. *Eaton v. Commonwealth*, 240 Va. 236, 397

S.E.2d 385 (1990), *cert. denied*, 502 U.S. 824 (1991); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, *cert. denied*, 469 U.S. 873 (1984); *Willis v. Commonwealth*, 10 Va. App. 430, 393 S.E.2d 405 (1990). If the jury is properly instructed on the relevant principles of law, it is not error for the court to refuse additional instructions on the same matters. *Williams v. Commonwealth*, 228 Va. 347, 323 S.E.2d 73 (1984). Thus, Eberwien did not have the right to have his particular instruction given to the jury when the court's instruction as tendered by the Commonwealth already covered this principle, and his appeal therefore fails on this issue.

V. Sufficiency

Finally, Eberwien contends that the evidence at trial was insufficient to sustain his convictions. We disagree. When the sufficiency of the evidence is challenged on appeal, we must construe the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deductible therefrom. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). Even though in the present case the evidence was primarily circumstantial, the inferences drawn from circumstantial evidence are within the province of the jury and not the appellate court so long as the inferences are reasonable and justified. *O'Brien v. Commonwealth*, 4 Va. App. 261, 263, 356 S.E.2d 449, 450 (1987).

Here, there was evidence that Eberwien mentioned the possibility of murdering his wife to several people shortly before her death, even stating that he could disguise his guilt by making it appear as though the murder had been committed by a burglar. When police arrived at the murder scene, Eberwien gave numerous different accounts of the events leading up to his wife's murder, and the evidence taken from the murder scene was completely inconsistent with any of the versions provided by Eber-

wien. In addition, there was expert testimony that the blood stains on Eberwien's sleeve following the murder were typical of the backspray caused by firing at a body at close range. Thus taken in the light most favorable to the Commonwealth, there is sufficient evidence to sustain Eberwien's conviction for both charges.

For these reasons, we sustain Eberwien's convictions.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 14th day of November, 1995.

Record No. 0671-93-2
Circuit Court No. J&D5,1,-92

AVARETTE M. EBERWIEN, S/K/A
AVERETTE M. EBERWIEN,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

From the Circuit Court of Hanover County

Before Judge Benton, Senior Judge Cole and Retired Judge Trabue.*

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

This order shall be certified to the trial court.

A Copy,

Teste:

RICHARD R. JAMES
Clerk

By: /s/ Mary V.P. Ring
Deputy Clerk

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* Retired Judge Kenneth E. Trabue took part in the consideration of this case by designation pursuant to Code § 17-116.01.

APPENDIX B

Virginia:

IN THE CIRCUIT COURT
FOR THE COUNTY OF HANOVER

April 5, 1993

Case No. J&D5,1,-92

COMMONWEALTH OF VIRGINIA

vs.

AVARETTE M. EBERWIEN

Upon Indictments, to-wit:
Murder & Use of a Firearm in Murder

ORDER

This day came the Attorney for the Commonwealth, and Avarette M. Eberwien, date of birth 7-20-43, § 229-56-4137, who stands convicted of felonies, to-wit: Murder, § 18.2-32; and Use a Firearm in the Commission of a Felony, § 18.2-53.1, offense date of 1-14-92, as charged in the Indictments, was led to the bar in the custody of the Sheriff of this County, and came also R. E. Chalkley, III, his attorney.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report

was presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

And thereupon, the defendant and counsel were given the right to cross-examine the Probation Officer as to any facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record.

Whereupon, the Court taking into consideration all of the evidence in this case, the report of the Probation Officer and such additional facts as were presented by the accused, and it being demanded if anything was known to be said why judgment should not be pronounced according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to LIFE in the penitentiary and he is fined the sum of $20,000.00 on the conviction of murder; and he is sentenced to two (2) years in the penitentiary on the conviction of Using a Firearm in the Commission of a Felony, said sentences are to run consecutively, and it is Ordered that he pay the court costs in the sum of $182.00.

The Court certifies that at all times during the trial of this case the defendant was personally present and the attorney was likewise personally present and capably represented the defendant.

And the defendant is remanded to jail to await transfer to the penitentiary.

/s/ [Illegible]
Judge

The defendant has LIFE in the penitentiary plus two (2) years to run consecutively.

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 21st day of February, 1996.

Record No. 952199
Court of Appeals No. 0671-93-2

AVERETTE M. EBERWIEN,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

[Filed Jan. 25, 1993]

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

AVARETTE M. EBERWIEN

MOTION IN LIMINE

COMES NOW the Commonwealth, by Kirby H. Porter an Assistant Commonwealth Attorney, and moves this Honorable Court for entry an Order ruling on the following issues:

I. BLOOD SPATTER EXPERT TESTIMONY

The Commonwealth intends to call Larry McCann of the Virginia State Police and Robert C. Zinn of the Prince William County Police Department to render expert opinion on blood stain pattern analysis. The testimony of these two expert witnesses relates to knowledge beyond the range of common experience. *Compton v. Commonwealth,* 219 Va. 716, 250 S.E. 2d 749 (1979).

Whether expert testimony should be allowed is within the sound discretion of the Court and is allowed even when not part of a particular art, science or learned profession, so long as there is sufficient expertise in the field to be of benefit to the jury. *Peters v. Shortt,* 214 Va. 399, 200 S.E. 2d 547 (1973).

The fact that conclusions of an expert is subject to question or contradiction has no bearing on admissibility

and it is competent unless palpably absurd. *Walrod v. Mathews,* 260 Va. 382, 171 S.E. 2d 180 (1969).

The Commonwealth's experts have and will deal with facts and data as opposed to inferences. *Harrison v. Commonwealth,* 211 Va. 8, 174 S.E. 2d 783 (1970); *Dougherty v. Commonwealth,* 204 Va. 240, 129 S.E. 2d 664 (1963).

II. REFERENCE TO POLYGRAPH EXAMINATION

The Commonwealth intends to introduce two separate statements made by the defendant to investigator Marshall Bailey of the Hanover Sheriff's Department. The first statement, dated January 15, 1992, contains a reference to taking a polygraph test at the end of the statement and the Commonwealth intends to play the entire tape up to that point and excluding the reference to a polygraph test.

The second taped interview with investigator Bailey consists mainly of a conversation concerning gathering hair samples of the defendant and would serve no probative purpose other than to embarrass the defendant. The Commonwealth intends only to introduce testimony from investigator Bailey concerning specific reference to the defendant's version of the events of January 14, 1992.

Should the defendant's counsel wish to play the tape, he will be provided with an exact copy and he may dedact the numerous reference to a polygraph test.

The Commonwealth also intends to introduce a statement made by the defendant to Special Agent L. W. Barden of the Virginia State Police, who is a licensed polygraph examiner. No mention will be made to the fact that the statement was made in reference to preparation for a polygraph test. The statement will be offered as a declaration against interest to a law enforcement officer and will not mention the defendant's polygraph

results or the fact that he later took a test. *Crumpton v. Commonwealth*, 9 Va. App. 131, 348 S.Ed.2d 36 (1989).

III. ACCUSATION THAT INVESTIGATION POINTS TO THE DEFENDANT

As stated above, the Commonwealth intends to have oral testimony concerning exact portions of the January 17, 1992, statement of the defendant. The Commonwealth will not include, in those excerpts, any accusatory statement of "I told you the evidence points toward you, right?" The Commonwealth agrees that statement has no place in the trial, and would not attempt to introduce it.

IV. REFERENCE TO CHIS SPRINKLE

The Commonwealth understands that the defense intends to introduce evidence that an individual by the name of Chris Sprinkle was within the Commonwealth of Virginia prior to the date of the murder of Alice Eberwien. Chris Sprinkle was, prior to the time of his death, an unsavory individual capable of many criminal acts and reference to his activities is intended to inflame the jury and draw their attention away from the real facts in issue. *Coe v. Commonwealth*, 231 Va. 83, 340 S.E. 2d 820 (1986).

There is absolutely no evidence that Chris Sprinkle was present at the Eberwien residence on January 14, 1992, or any other date. There is no evidence that he even committed a crime remotely similar to the one in question and any suggestion that he had any involvement with the present crime would border on reckless disregard for the truth. Merely offering evidence of another's bad reputation is irrelevant. *Pope v. Commonwealth*, 234 Va. 114, 360 S.E. 2d 352 (1987).

It is a fundamental principle of law that evidence must relate to the facts of the case at bar and tend to prove or disprove such facts. Collateral facts, incapable of afford-

ing any reasonable presumptions or inferences related to the facts at issue or so remote as to be irrelevant and immaterial are inadmissible. *Johnson v. Commonwealth,* 2 Va. App. 598, 347 S.E. 2d 163 (1986).

The fact that similar (Sprinkle's crimes were not remotely similar) acts were committed by another person, at other times, under other circumstances, unless connected in some way indicating a relevancy beyond mere similarity is inadmissible. There must be facts such that all physical conditions were identical, the reference to a third party should show such a nexus to the present case as to affect the result of the outcome, beyond mere speculation and the facts of other criminal acts must be substantially the same separated only by a very brief interval of time. Before the evidence of the guilt of another is admissible, the Virginia courts, require that the evidence must "clearly" link the other person to the commission of the crime. *Karnes v. Commonwealth,* 125 Va. 758, 766, 99 S.E. 562, 565 (1919). The evidence introduced must point directly to the guilt of a third party. C. Friend, *The Law of Evidence in Virginia,* Section 150, at 344 (2d ed. 1983).

Res inter alias acta, prohibits the introduction of acts or declarations of third parties as incompetent evidence, having no bearing on the matter in dispute. To do otherwise would unduly broaden the issues and unfairly prejudice the jury. There must be a strong probability that a third party is responsible for the criminal act, beyond mere speculation.

Any reference to Sprinkle would be of no probative value and immaterial. Evidence must tend to establish the proposition for which it is afforded. Even relevant evidence should be excluded if its prejudicial effect outweighs its probative value. *Evans v. Commonwealth,* 5 Va. App. 188, 361 S.E. 2d 436 (1987).

Circumstances which have no intimate connection and no link to the facts of this case are irrelevant and serve only to prejudice the minds of the jury. *Johnson v. Commonwealth*, 3 Va. App. 444, 350 S.E. 2d 673 (1986). Collateral evidence incapable of affording a reasonable presumption or inference is of no probative value and too remote to be of any value. *Clinebell v. Commonwealth*, 3 Va. App. 362, 349 S.E. 2d 676 (1986).

The Court properly denied evidence that the defendant tried to introduce concerning the bad reputation of a person who left town under suspicious circumstances who looked like the defendant where the party standing trial tried to incriminate another. *Harris v. Commonwealth*, 129 Va. 751, 105 S.E. 541 (1921).

In order for the defendant to introduce evidence that some third party committed the crime, there must be evidence to support such an accusation. *Huddleston v. Commonwealth*, 191 Va. 400, 615 S.E. 2d 276 (1950).

The Commonwealth is not required to exclude every possible theory or surmise presented by the defense. The hypotheses which the prosecution must exclude are those which flow from the evidence itself and not from the imagination of defense counsel. *Black v. Commonwealth*, 222 Va. 838, 284 S.E. 2d 608 (1981); *Williams v. Commonwealth*, 234 Va. 168, 360 S.E. 2d 361 (1987).

V. DANA DONOVAN 5TH AMENDMENT

The Commonwealth intends to call Dana Donovan should the Court allow reference to Chris Sprinkle by the defense. Ms. Donovan has told the Commonwealth on numerous occasions that Sprinkle was without the Commonwealth on January 13, 1992. The Commonwealth understands that Ms. Donovan now intends to plead the Fifth Amendment since she is irritated by the fact that the Commonwealth has placed her on a material witness

bond and she has not been extradited to Arizona, an extradition which she has never made clear she intends to fight or allow.

In order for Ms. Donovan to plead the Fifth Amendment, she must establish that there is a real and substantial hazard of incriminating herself and subjecting her to penal prosecution. Mere speculation that testimony may result in criminal action is not enough. *Johnson v. Riddle*, 222 Va. 428, 281 S.E. 2d 843 (1981).

Her claim of a Fifth Amendment privilege is not a blanket bar to all questions and must be asserted to each question in order to determine if the claim is justified. *Cunningham v. Commonwealth*, 2 Va. App. 358, 344 S.E. 2d 389 (1986).

Further, section 19.2-270 grants immunity to an individual tesitfying on behalf of the Commonwealth. The defendant would argue that this does not preclude the sister states or the federal government from initiating criminal proceedings against her. The Commonwealth's Attorney for each county or city can not grant immunity for a party extending beyond that county or city, yet the law allows a grant of immunity to force testimony in a particular trial. Why then should the result differ beyond the boundaries of the Commonwealth? The witness must establish a real likelihood of prosecution.

Regardless of whether Ms. Donovan pleads the Fifth Amendment, she has made the same statements she will be called to testify about to law enforcement officials, and since they are against interest they fall within a well established exception to hearsay. The confession by a party to criminal acts may always be used against them through the party to whom they made the confession. Since Ms. Donovan has made a statement to everyone who would listen and now chooses to take the Fifth Amendment she clearly invokes the privilege for ulterior motives. She can not hope to have anything to say

VIII. STATEMENTS MADE IN THE DEFENDANT'S PRESENCE

The Commonwealth intends to call witnesses to testify that the victim made statements, in the defendant's presence, that he intended to kill the victim. These statements, upon being heard by the defendant, went undenied. When statements are made which ought to have been denied there is a presumption that the party acquiesces. *Saunders v. Newsome,* 179 Va. 582, 19 S.E. 2d 883 (1942). Admissions by conduct, silence or adoptive admissions are admissions nonetheless. *Clemmer v. Commonwealth,* 208 Va. 661, 159 S.E. 2d 664 (1968). Statements made by the victim in the defendant's presence about the defendant's intent to commit a crime against the victim should be allowed. *Jones v. Commonwealth,* 202 Va. 236, 117 S.E. 2d 67 (1960).

CONCLUSION

WHEREFORE, het Commonwealth prays that this Honorable Court enter an Order consistent with the above requested pleadings.

Respectfully submitted,

/s/ Kirby W. Porter
KIRBY W. PORTER
Assistant Commonwealth's
Attorney for the
County of Hanover

APPENDIX E

[59]

VIRGINIA:

IN THE CIRCUIT COURT
OF HANOVER COUNTY

Case No. 05-92J&D

COMMONWEALTH OF VIRGINIA

-v-

AVARETTE M. EBERWIEN

TRANSCRIPT of COMMONWEALTH'S MOTION IN LIMINE, in the above, when heard on January 26, 1993, before Honorable Richard H. C. Taylor, Judge.

* * * *

[61] NOTE: At the calling of the case, the Court Reporter being duly sworn, the matters are begun as follows:

THE COURT: All right, let the record show that Mr. Eberwien is present, Mr. Chalkley is present, and Mr. Porter's present, and we're here on motions.

MR. PORTER: Yes, sir, Judge. Judge, if I could, I filed a motion in limine, as well as Mr. Chalkley. Mr. Chalkley has three grounds for his motion in limine and I believe we've been able to resolve all three of those. If I could, Judge, if we could just look at the motion I filed—

THE COURT: Yes, sir.

MR. PORTER: —the first grounds for Mr. Chalkley's motion in limine was in reference to the expert blood spatter examination. His problem with that was, Judge, that he talked with Mr. McCann and Mr. Zinn and he has resolved that. Mr. McCann and Mr. Zinn,

and the Commonwealth is putting on the record, are not going to say anything to the effect that the defendant shot his wife. They're going to place [62] the defendant at a location in reference to his wife and leave the ultimate issue to the jury. So we have been able to resolve that.

The second one, Item Number 2 in my motion, refers to Mr. Chalkley's problem with reference to a polygraph examination. We have resolved that. The Commonwealth is going to call Marshall Bailey with the Hanover County Sheriff's Department and play the January 15th, 1992, taped interview with the defendant, in toto. However, the very last question as they're wrapping matters up is: Now you remember you've got to take that polygraph test toworrow. We will end the tape before that, Judge, and that reference will be didacted.

Thirdly, under the same heading, the Commonwealth intends to call Agent L. W. Barden of the Virginia State Police, a special agent. He will be called to testify as a special agent/investigator who read the defendant his Miranda Rights and took a statement, and no reference will be made to the fact that it was in preparation or in conjunction with a polygraph test. That will not—he will just be presented to the jury as a police officer [63] advising the defendant of his rights and taking a statement.

THE COURT: All right, sir.

MR. PORTER: Finally, the second—I skipped one, Judge. The second taped interview—

THE COURT: Yes, sir.

MR. PORTER: —above that, the Commonwealth will not play that tape. The majority of that tape is that was a taped conversation where the defendant came in and it was for the purpose of drawing some hair samples, mainly, and it serves no purpose other than to play an hour long tape of the defendant plucking various private hair samples and we would not go into that. There are some specific references to the events of January 14th,

surrounding the death of Mrs. Eberwien. We will simply have Investigator Bailey testify directly to direct questions about those events. There will be no reference to polygraph testing and there will be no reference to any hair samples being drawn, and Mr. Chalkley has agreed to that.

Next, Mr. Bailey, in his January 17th taped interview, the one about the hair [64] samples mainly, makes a statement: I told you the evidence points toward you, right? The Commonwealth will not include that in the specified portions of that tape—of that conversation that we have the officer testify to. So we're in total agreement with Mr. Chalkley.

THE COURT: All right. Well a word of caution, and I admonish y'all, we had a situation out here, a similar situation, where we took things off the tape and on examination and in the heat of battle, one side or the other, leaning on the witness, said well are you sure that's all he said, and he said, no, he also said this, and he read the part that we'd deleted.

MR. PORTER: Yes, sir.

THE COURT: So don't get hot under the collar and do that.

MR. PORTER: Yes, sir.

THE COURT: We'll get a mistrial, I'm afraid.

MR. PORTER: Next, Judge, that takes you to Item Number 4 on my motion, which starts my motions in limine. If I could, basically, it's my understanding, Judge, through [65] pieces of physical evidence that have been provided to me through defense counsel, that defense counsel intends to allude to the fact that a Christopher Sprenkle, a gentleman of unsavory character, was in the Commonwealth of Virginia at various times and at various locations prior to the death of Alice Eberwien on January the 14th at approximately eight to nine o'clock at night on that date. The Commonwealth has cited in here several cases believing that its the defense intent to, one, throw, cast doubt in the minds of the jury, throw out the name of this bad individual just as

if they said well, who can inspire fear, well, Ted Bundy, you name it, Lee Harvey Oswald, any infamous criminal. And there's absolutely nothing in the facts, Judge; I have Officer Stanley Kirks here, Investigator Stanley Kirks, with the Hanover County Sheriff's Department, and he's prepared to testify about the modus operandi of Mr. Sprenkle. Plus, I have various statements which I'm willing to submit to the Court and printed newspaper interviews which I would ask the Court to take judicial notice of. If you look at the rules of evidence, the Court can take [66] judicial notice of encyclopaedias, law journals, and newspaper articles. And I would ask the Court to take such judicial notice of the fact that Dana Donovan, when interviewed by *The Herald Examiner* (sic) gave information that Chris Sprenkle left the Commonwealth of Virginia on the evening of January the 12th, going over to the early morning hours of January the 13th. There's absolutely nothing to suggest that Chris Sprenkle was ever at the Eberwien residence, that Chris Sprenkle ever committed any crime remotely similar to the Eberwien murder. Mr. Sprenkle up until the 12th of January was a B&E artist. He broke into homes in the daytime, residences, no one home, cut phone lines, and either entered through windows or broke glass to gain entrance. There's never any evidence he was ever armed with a shotgun when he did any of these things and he never killed anyone. The first person he ever killed was his brother two days prior to this and that was a vendetta for diming him out, as the street vernacular is, that sent him to prison. His brother bought a stolen VCR and when his brother was caught with it, he said I got it from Chris and Chris ultimately was [67] was charged, never served the warrant on him, and while he was on the lam he killed his brother for those accusations and also for marrying his girlfriend while he was in the state penitentiary on other charges. The defendant (sic) then traveled out of the Commonwealth across country and killed his second person in the State of Arizona.

MR. CHALKLEY: You said the defendant. You mean Mr. Sprenkle?

MR. PORTER: I mean Mr. Sprenkle killed his second person at a convenience store armed robbery not a residential B&E and, ultimately, was shot and killed and took his own life in the State of Illinois. There's absolutely nothing, Judge, to show that Mr. Sprenkle has any ties, any remote similarity, and it would just be unduly broadening the issues before the jury to allow his name even to be mentioned. I point the Court to page 4, top paragraph, it says the Court properly denied evidence that the defendant tried to introduce concerning the bad reputation of a person who left town under suspicious circumstances, who looked like the defendant, where the party [68] standing trial tried to incriminate another, *Harris versus Commonwealth,* 129 Va. 751, 1921. That was a case, Judge, where a defendant standing trial tried to introduce evidence that another individual of the same racial persuasion just simply, unexplicably, left town and just simply tried to cast doubt in the jury's mind as to the identity. And the Court very properly ruled there unless you've got similar physical conditions, any evidence that this is what this guy does, just because some guy leaves town and it's suspicious has absolutely no place even coming into evidence. It's of no probative value. Evidence must be offered to support or dispute issues that are relevant to the case, and there's absolutely nothing here in this case to allow Mr. Sprenkle's name even being mentioned, Judge.

THE COURT: All right, Mr. Chalkley.

MR. CHALKLEY: May it please the Court, Judge, I agree that there must be some evidence to support an accusation towards Mr. Sprenkle, and I think the evidence is present in this case. Mr. Sprenkle first came to my [69] attention through discovery furnished me by the Commonwealth of Virginia, because when Mr. Sprenkle was killed in the State of Illinois he had with him a sawed-off shotgun, which was compared and found, in its cur-

rent condition, not to be the weapon that fired the slug found at the Eberwien household. Pursuant to that, through contact with police officers, Mr. Sprenkle allegedly lived in a house in the Gilpin Court area. Now the individual who came into the Eberwien household, the weapon is alleged to have been a sawed-off shotgun. A Richmond police officer who responded to that address found two sawed-off shotgun barrels at that residence, one a single barrel, one a double barrel. Obviously, we have no evidence at this time nor I imagine at trial as to whether or not there will ever be—whether it was a single or a double barrel shotgun. That is not stated anyhere. It's only described as a short shotgun. That, I submit to the Court, based upon everything Mr. Porter has told you about Mr. Sprenkle, which is correct and I vouch that for the record, he's not added or deleted anything that I would put in otherwise, that is evidence that someone [70] else, whether or not it's Chris Sprenkle or not, I don't know, but Mr. Porter says it's to cast doubt. Yes, sir, I'm certainly coming here trying to cast doubt. I admit that freely.

THE COURT: Yes, sir.

MR. CHALKLEY: But I think based upon the fact he is found with a sawed-off shotgun and two sawed-off barrels are found at the place where he may have lived, I think that is enough evidence to put it before the jury.

THE COURT: Well how will the evidence get to the Court and jury that that particular investigator found that particular shotgun in that particular location?

MR. CHALKLEY: I have subpoenaed the Richmond police office to bring—to come to Court.

THE COURT: What is the nexus between Gilpin Court and—

MR. CHALKLEY: That is where—

THE COURT: Hanover?

MR. CHALKLEY: Mr. Sprenkle was rumored to have been living and I assume Mr. Kirks, since I believe he did everything on [71] Mr. Sprenkle, can testify it

was rumored he was living in Gilpin Court at this particular location. I believe Mr. Kirks, indeed, went there looking for Mr. Sprenkle at one time. And I can't tell the Court that because I haven't talked with Mr. Kirks about it because of the motion because I didn't want to put him in a bind.

THE COURT: Yes, well I understand that. No, I've got to—I'm not asking you to—I've got no right into how you're going to try your case. I just was wondering generally—

MR. CHALKLEY: Well I don't want to put words in Mr. Kirks' mouth, either. This is what—

THE COURT: And I don't want to—I just want a general idea of how it would get in. All right, Mr. Porter.

MR. PORTER: Your Honor, if I could, Mr. Chalkley mentioned that this first came to his attention through discovery. That's correct, Judge. The Commonwealth very diligently, through the process of forensic science, has attempted to discover is there any other possible [72] person who could have shot Alice Eberwien on that night. And when it came to our attention that an individual left this town just prior to the murder, we took a sawed-off shotgun that was never reported ever used in any crime by Mr. Sprenkle, submitted it to the Bureau of Forensic Sciences and have a report, scientific report, that that shotgun could have not been used to kill Alice Eberwien. Next, we took hair samples from the deceased, Mr. Sprenkle's, body. We submitted those to the Bureau of Forensic Sciences and could not match those hair samples to anything in the Alice Eberwien murder case. It's just—Judge, there's just no evidence beyond the fact that a guy of bad report lived in another town and even left town the day before this murder. It's got no nexus. The Court hit the nail right on the head, Judge. No nexus whatsoever to this crime. If Chris Sprenkle's bracelet was found a block away, maybe. If his wallet was found within miles of the house, maybe. But there's no evidence

he even knows where Hanover County is, Judge, and it would be pure speculation.

THE COURT: There's no question [73] in anybody's mind that the weapon was a shotgun but we've never found the shotgun, is that right?

MR. PORTER: Yes, sir, we did find the shotgun. We found it in his truck when he took his own life in Illinois. The chain of evidence was stipulated to that. The Commonwealth procured that shotgun, submitted it to the lab, and it came back not being the weapon firing the shot.

THE COURT: Oh, no, you misunderstood me.

MR. CHALKLEY: You're talking about the wrong shotgun.

THE COURT: I'm talking about the Eberwien—the one that killed Alice Eberwien.

MR. PORTER: Oh, yes, sir, no doubt. The shell was found, the casing was found, it was a .12 gauge shotgun.

THE COURT: But the shotgun wasn't?

MR. PORTER: The shotgun was not, no, sir. But my—

THE COURT: How are you getting, Mr. Chalkley, and I don't want you to tell me [74] but I'd rather know what's coming than to be surprised. How are you going to jump from where you are to where you want to be? How are you going to—are you saying that Mr. What's His Name was ever in that area or knew anything about that area?

MR. CHALKLEY: Well I can get people to testify he was a resident of Hanover County. I mean that's not a problem. As I understand it, he was sentenced in this Court before.

THE COURT: Yes, I think that Mr. Sprenkle, I don't know whether it was he or his brother or somebody lives out here. I think they lived in that area, didn't they?

INVESTIGATOR KIRKS: No, sir.

MR. CHALKLEY: Mechanicsville; I think he's a Mechanicsville resident, Judge. I have no one to place Mr. Sprenkle in that area.

THE COURT: All right.

MR. CHALKLEY: I have no one to say they saw him that day, the day before, a week before, ever. So I don't have that. I have a shotgun submitted by the Commonwealth found with Mr. Sprenkle. I assume I have Mr. [75] Kirks to say he was the investigator on Mr. Sprenkle's crimes and in the course of his investigation, he went to a certain house in the City of Richmond, he found out that guns had been seized from that house, and when he went to the Richmond property room to get the record, there were two sawed-off shotgun barrels that had been found at that residence, one of which, if the shotgun Mr. Sprenkle had was in the current condition, on the 14th of January, because you're not talking about rifling marks on a barrel, you're talking about the mechanism, the firing mechanism which can be changed, so I'm told by the experts, was not the weapon that fired that shell. So that's one shotgun, one barrel. That still puts in the area where Mr. Sprenkle was known to live, where the investigator went, another sawed-off shotgun barrel, and that's pretty much all I have, Judge.

MR. PORTER: Your Honor, defense counsel is quite simply asking the jury and the Court to make a huge leap of faith. What we do know—he's saying what we don't know about Mr. Sprenkle. Well the Commonwealth will tell the Court what we do know about Mr. Sprenkle. [76] His haid didn't match anything found at the scene, his shotgun that he was found with didn't match anything that was used to fire at the scene, and, as a matter of fact, Judge, there is evidence, newspaper articles, interviews with Officer Kirks, I will put him on the stand, it's not hearsay because it's Dana Donovan's statements against interest, she's unavailable to the Commonwealth, as the Court is now aware, as of yesterday's hearing, that they left the state of Virginia the day before. Now with

what we do know, it is very clear that it would be recklessly—a reckless disregard for the truth to even mention Mr. Sprenkle and then have that seed planted in that jury's mind, prejudicial value vastly outweighing any probative value, and then have to put on the Commonwealth the burden now of proving that a dead man, conveniently dead man, who can't be brought to trial here did not do the murder when very clearly, Judge, he wasn't in the State of Virginia. And I would also for the Court's purposes of making its decision cite to you the principle of *res inter alios acta*. That is a proposition at law that prohibits the [77] introduction or acts or declarations of third parties as incompetent evidence having no bearing on the matter in dispute. To do otherwise, would unduly broaden the issues and unfairly prejudice the jury. I can't state it any simpler than that, Judge.

THE COURT: Yes, sir. Well, Mr. Bremner, the famous criminal lawyer, in the old Courthouse over there, in a lecture to those of us who were just starting to practice law, says when you've got the law, you beat on the law and when you've got the facts, you beat on the facts and if you ain't got either, you're beat on the table. And, Mr. Chalkley, his job is to pull as many red herrings across as he can and the normal way to do it is to get it into evidence before the Court realizes what's happening. But don't we get more intelligent jurors nowadays than we did when all those rules were made?

MR. PORTER: Well, Judge, regardles of whether the jurors are more intelligent nowadays, it's a fact of law that, obviously, throughout the growth of the history of law we've decided that the way the human mind [78] works, it's just not worth taking the chance. It's just unjust.

THE COURT: Mr. Chalkley, it really worries me. If you could just show me some slight connection between, and I haven't heard, of course, the evidence of any case involving any of these people, but if I could just have some connection, other than the fact that on

the 14th Mr. What's His Name was alive. He may have been in Colorado or Nova Scotia, he may have used or may have owned or may have had possession of a sawed-off shotgun and Alice Eberwien was killed with a shotgun. We really don't know whether it was sawed-off or not. But what is the connection? Is there anything other than that?

MR. CHALKLEY: Judge, I don't believe there is, other than that she was killed with a sawed-off shotgun and Mr. Sprenkle was in possession of one sawed-off shotgun and another barrel was found at the location where he lived. I can't tell the Court anymore than what I know at this point and that is all I know.

THE COURT: Yes, sir.

MR. PORTER: Your Honor, if I [79] could, for the record, I would like to call Investigaor Kirks, if I might.

THE COURT: Let me get the issue in my mind straight before we do that.

MR. PORTER: Yes, sir.

THE COURT: Mr. Chalkley, there's no doubt in your mind that, through some evidence, whether direct evidence from Miss Donovan or written evidence from her or statement that she made to other people, that we can put everybody in that party way away from Virginia on the day of the murder?

MR. CHALKLEY: Judge, all I can tell you is Mr. Allen was kind enough to let me go see Miss Donovan and Miss Donovan told me she's not talking to me or anybody else involved in this case.

THE COURT: Yes, sir. Well I don't think she's going—

MR. CHALKLEY: If Mr. Porter says he has it, I'm sure he has it. I haven't seen it. I don't think he was under any obligation to show it to me, so I'm not suggesting that. But if he says he has it, I'm sure he has it. I've not ever examined Mr. Kirks about this [80] at all because I didn't want to get him in the middle of

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anything. But if Mr. Porter says it's there, I'm sure it's there.

MR. PORTER: I'll put Mr. Kirks on to put it into evidence, Judge.

THE COURT: Yes, well I'll hear Mr. Kirks before we get through. I just wanted to know where I was going. I don't know whether you want to put it into evidence or not.

MR. PORTER: Well I'd like to for purposes of appeal anyway, Judge.

THE COURT: Come around and be sworn, Mr. Kirks.

THE CLERK: Do you solemnly swear the evidence you give in the case of Commonwealth versus Eberwien, now before the Court, will be the truth, the whole truth, and nothing but the truth, so help you God?

INVESTIGATOR KIRKS: I do.

[81] *INVESTIGATOR STANLEY H. KIRKS, JR.*, called as a witness on behalf of the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PORTER:

Q Investigator, please state your name and occupation.

A Stanley H. Kirks, Jr., investigator with the Hanover County Sheriff's Department.

Q I'd like to turn your attention to the year 1991, spilling over into the early January month of 1992. Did there come a time, prior to January, 1992, where you had an opportunity, in your capacity as an investigator, to look into a gentleman by the name of Christopher Sprenkle?

A Yes, sir, I did.

Q All right, did you, during the course of your investigation into Mr. Sprenkle, start to compile what is commonly referred to as a modus operandi or mode of operations for Mr. Sprenkel?

[82] A Yes, sir, I did.

Q And do you have, for lack of a better—

MR. CHALKLEY: Judge, I'll stipulate that what Mr. Kirks has in front of him is an official record and it's admissible and it may be referred to.

MR. PORTER: All right, thank you.

THE COURT: All right, sir.

BY MR. PORTER: (Continuing)

Q You have before you in your records Mr. Sprenkel's goings-on during his—the term of your investigation, correct?

A Yes, sir.

Q Do you have in there a newspaper article wherein a reporter interviewed a Miss Dana Donovan concerning her travels with Mr. Sprenkel during the month of January?

A Yes, sir, I do.

Q All right, and would you please hold that up?

A (Witness complying).

Q Have you had an opportunity to [83] read that article?

A Yes, sir, I have.

Q Would you please tell the Court what that article says in respect to when and if Mr. Sprenkel and Miss Donovan ever left the Commonwealth of Virginia on or about January the 12th, 1992?

A Basically, Your Honor, it states that, without going in and reading the whole thing, mayhem at the roadside in Illinois on Sunday morning completed a cycle that began back in the Virginia mountains January the 12th with a gruesome blazing gunfire of bodies and blood, and Dana's quote to the newspapers is: He told me three months ago he was going to kill his brother, Miss Donovan said. It all began over stolen property that his brother bought and then the brother telling the police that Chris sold it to him. Madison County authorities believe that the family was killed on the 12th. And it goes on to state that after that that she was abducted

at gunpoint by Chris Sprenkel and basically that they—it doesn't say that they left the state but it goes on to talk about their travels headed towards the West Coast.

Q Does she state in there that something happened on the 12th, the evening of the 12th, spilling over into the early morning hours of the 13th in that article?

[84] A It basically—she tells them that on the 12th is when he went to Madison County and killed his brother and his brother's wife. Then he came back to Richmond. It doesn't say—I don't think it says Richmond, but anyway, they got back together. He finds her at a house in Richmond and then they begin their cross-country trip.

Q They begin their cross-country trip?

A Right.

Q All right, did you have an opportunity to later interview Miss Donovan?

A Yes, sir. I've interviewed her numerous times.

Q All right, what was the first time you interviewed Miss Donovan?

A Well I've interviewed Miss Donovan numerous times prior to the death of Chris through my investigations on crimes in our county, and as this investigation progressed and other—he became responsible, or it appeared to me through my investigation, for other crimes, I would talk to her from time to time on the streets in the city and—

Q Did there come a time where after their cross-country trek she was brought back to Hanover County?

[85] A That's correct.

Q And did you interview her on that occasion?

A Yes, I did.

MR. CHALKLEY: Judge, if it please the Court, if it helps, you may lead.

MR. PORTER: All right, thank you.

BY MR. PORTER: (Continuing)

Q Did she make a statement to you about when she and Chris Sprenkel left the County of Hanover?

A Yes, sir.

Q What was that statement?

A They left on Monday morning, approximately five o'clock in the morning, on January the 13th.

Q And they went where?

A They left 95 southbound, went to Interstate 40 in North Carolina, and they went up Interstate 40 and they ended up getting a hotel room in North Carolina that day.

Q Did she eventually tell you that they traveled to Arizona?

A They went all the way to the West Coast to California and then proceeded back across the [86] country, coming back east and ended up in Arizona.

Q And as a result of finding out all this, did you now go back and try to retrace their steps and confirm that through official police reports from other jurisdictions?

A That's correct.

Q All right, did you have—you have in your possession, in your file now, a teletype that you received from another jurisdiction indicating that they were believed to have stayed in Memphis, Tennessee, on a particular date?

A Yes, I do.

Q And would you please tell the Court what that date is?

A (Looking at notes). I don't know that it goes into the day, let me see. It goes on to say that he's traveling with a white female companion, left Richmond, Virginia, on January the 12th, 1992, after the male subject killed his brother and sister-in-law on January the 12th, 1992. They traveled south on I-95 into North Carolina, then west on I-40 through Memphis, Tennessee. They stayed in a motel immediately inside that area.

Q And you got that information from whom?

A That was compiled by information [87] received from Dana Donovan, the Illinois State Police, and receipts that were found in the vehicle at the time of his death.

Q All right, now with respect to your knowledge about Mr. Sprenkel's modus operandi, as I referred to it earlier, have you compiled a list of how many cases you were investigating him for or had knowledge about him during the course of your investigations?

A Yes, sir.

Q How many cases and what types of cases were they?

A Basically it is twelve burglaries, there's a capital murder case in Madison County—

Q That would be his brother?

A That'd be his brother and his brother's wife, and also I'm familiar with the homicide of the store clerk in Arizona—

Q All right.

A —and the shooting of the state tropper in Illinois.

Q All right, now of those twelve burglaries, have you been able to determine through your investigation, through retrieved property—is it fair to say that you got a tip, went to West Virginia, retrieved property, correct?

[88] A Correct.

Q Received information from an individual out there that that was where Chris Sprenkel stayed and that was property from burglaries he'd committed, correct?

A That's correct.

Q You now took that information and fed it through what's called a computerized tracking system, AFIS, I believe it's called?

A Well what I did, I recovered that property in West Virginia and brought it back to Virginia and not having knowledge at the time of where this property had come from, some of it I had identified as coming from burglaries in Hanover County; a lot of this property, I didn't have any idea where it came from. At that time I sent a statewide teletype listing each individual piece of property and from that teletype I received replies from other jurisdictions indicating that they were missing property of that similar description.

Q And did you receive information about the circumstances under which the property was taken, daytime, nighttime, residence, store?

A Yes, I did.

Q Of the twelve burglaries, are you now able to tell the Court your investigation showed that [89] were—how many of those were daytime?

A I can tell you that two of the twelve I don't have the incident reports on from Greene County. Out of ten of them, eight of those burglaries were daytime burglaries; two of those burglaries happened within a time frame of several days, so that's really no way of being able to tell whether it was day or night.

Q So ten were night; others, there was an interval where no one could tell you whether it was day or night?

A Eight of them were day.

Q All right, now any significance to how entry was made on those?

A Most often Chris broke the glass, usually in a door or a window, to gain entry to a home.

Q All right, of those eight or ten or however many you personally have knowledge about, how many of those had individuals home at the time of the burglary?

A None of them.

Q Of those, how many of those burglaries resulted in a homicide in the commission of a burglary now?

A None of them.

Q And you've had an opportunity to [90] investigate the murder surrounding his brother, correct?

A That's correct.

Q All right, your investigation led you to look to Chris Sprenkel for killing his brother for what reason?

A The motive, from talking to Dana and talking to —I actually talked to his brother and his brother's wife on December the 5th, the actual victims, because some of the property that I'd recovered in West Virginia had come out of their residence, which had been burglarized, and in talking to them, Chris had sold his brother a shot-

gun and his brother carried that shotgun to work and happened to be showing it to an individual that he worked with and that individual made the statement: Well, that's my shotgun, and come to find out, this man's home had been, who he worked with, had been burglarized a couple days prior to that and the shotgun, in fact, was stolen out of his house. They then notified the Sheriff's Office and when they responded to the workplace, Mr. Sprenkel's brother, of course, gave the police information as to where that shotgun had come from.

Q Shortly thereafter, Mr. Sprenkel's brother was killed at Mr. Sprenkel's hands, is that correct?

A That's alleged to have happened [91] that way.

Q All right, was there any evidence of a breaking or an entering when he killed his brother?

A Not that I'm aware of.

Q All right, was his brother killed with a shotgun?

A No, he was not.

MR. PORTER: Thank you. Answer any questions that defense counsel has. I move to submit, Your Honor, the newspaper article which Officer Kirks just read to the Court. I would like to, at a later date, substitute the article with a Xerox copy.

MR. CHALKLEY: I have no objection to that.

THE COURT: All right, sir.

MR. CHALKLEY: To the introduction or to the substitution.

NOTE: The above-referred-to Newspaper Article was marked and received into evidence by the Clerk as: *Commonwealth's Exhibit Number 1.*

[92] CROSS-EXAMINATION

BY MR. CHALKLEY:

Q Mr. Kirks—excuse me, Investigator Kirks, the burglaries you spoke of, did they occur before the January 12th homicide in Madison County?

A Yes, they did.

Q And prior to January 12th, am I correct, Mr. Sprenkel had killed no one?

A Not that I'm aware of.

Q Not that it's alleged?

A Not that it's alleged.

Q In these burglaries, do you know if, using his mode of breaking glass, if there were any open doors or open windows available to him?

A No, I do not.

Q What type items did he take in these burglaries?

A The cases that I'm familiar with, most often the home was totally ransacked and he took everything from kitchen appliances to socks and underwear, jewelry, money—

Q Firearms?

A Firearms.

Q Did you ever have occasion to trace Mr. Sprenkel's whereabouts to a house in Gilpin Court?

[93] A Yes, sir, I did.

Q When was that, sir?

A That would have been on the morning of January the 13th.

Q And pursuant to your investigation of Mr. Sprenkel, did you have occasion to find out that a Richmond police officer had recovered weapons from that location?

A Yes, I did.

Q Did you receive that report—a report of what was found there, sir?

A Yes, sir.

Q What was found at that location on January 13th by the Richmond officer?

A (Looking at notes).

Q Were there any sawed-off weapons, barrels found there?

A Yes, sir, there was. As far as the barrels, it was one .12 gauge single barrel that had—just the barrel had been sawed-off and it was one .12 gauge double barrel shotgun barrel that had been sawed-off.

Q And all that was found was those two barrels regarding those two weapons?

A Excuse me?

Q They didn't find a stock cut [94] off that wasn't—they didn't find the barrel and the weapon it originally belonged to, did they? They just found the sawed-off barrels, is that correct?

A That's correct.

Q Did Miss Donovan ever tell you where she was on January 14th?

A On the 14th?

Q Yes, sir.

A I don't know whether she told me on that particular day. She told me that they left town on the morning of the 13th at approximately five o'clock a.m. from the address on Gilpin Court.

Q Now Miss Donovan told you she was abducted. Was she abducted the entire time?

A No, sir, and she's since recanted that statement and stated that she left on her own with him.

Q Has she recanted other portions of her statements to you?

A No, sir.

Q Did I understand you correctly to say that Chris had sold his brother a shotgun that was stolen from another place?

A That's correct.

Q And that's what got you up to West Virginia?

[95] A No—

Q Or wherever it was.

A —Dana led me to West Virginia.

MR. CHALKLEY: I have nothing further. Thank you.

MR. PORTER: One other question, if I could, Judge.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. PORTER:

Q When you went to Gilpin Court, did you find any residents at that location? People living there?

A Yes, sir, I did.

Q Did you talk to them about the whereabouts of Chris Sprenkel?

A Yes, sir, I did.

Q As a result of the conversation you had with them, where did you start looking for Chris Sprenkel? In the State of Virginia or elsewhere?

A I started looking in the State of Virginia.

Q Where in the State of Virginia?

[96] A South Richmond.

Q And why did you go to look in South Richmond?

A From information I had received, when they left that morning, they were going, Dana and Chris were going to a hotel in South Richmond somewhere. At that point in time, I had never seen the red truck that they were supposedly traveling in, so I had this girl that they had stayed with the week prior to this incident get in my vehicle and I rode from Richmond to Petersburg on U.S. Route 1, or the Pike, and we went in every hotel that I saw looking for the red truck. And then we got on 95 in Petersburg and came back north and got off at every exit and went to the hotels along the interstate trying to find the red truck.

Q And did you later tell Miss Donovan when you interviewed her that you had done that?

A Yes, I did.

Q And did Miss Donovan tell you that that was a waste of time?

A Yes, she did.

Q Why was it a waste of time?

A Because they had left that morning at five o'clock and instead of going and getting a hotel room they had decided to go on and leave the state.

MR. PORTER: Thank you. No other [97] questions.

RECROSS-EXAMINATION

BY MR. CHALKLEY:

Q What type of red truck was this?

A It was a Chevrolet S-10 pickup.

Q Did the people you interviewed at the Gilpin Court residence tell you whether or not Mr. Sprenkel had stayed there with Miss Donovan?

A Yes, they did.

Q And had they?

A Yes, they had.

Q Did they connect Mr. Donovan (sic) to the weapons the Richmond police officer found, to the two barrels?

A Dana?

Q No. Did they connect, I'm sorry them to Mr. Sprenkel, the two barrels?

A Yes.

MR. CHALKLEY: All right. Thank you very much.

MR. PORTER: I have no other questions of the officer, Judge.

THE COURT: I'm trying to think [98] whether I've got any. Alright, did you compare the exhibits?

MR. PORTER: Yes, sir, Judge.

THE COURT: Show them to Mr. Chalkley and make sure we've got what they are.

MR. CHALKLEY: I have no objection, Judge.

NOTE: As this time the Clerk substitutes a copy for the Xerox of Commonwealth's Exhibit Number 1.

THE COURT: Does your investigation have them stopping between Richmond and going south on 95 until they get to Memphis?

THE WITNESS: Your Honor, according to Dana, they left about five in the morning, went south on 95 into North Carolina, and, according to her, they stopped somewhere in North Carolina and got a room, without stopping. She never made any mention of stopping anywhere after leaving earlier that morning, that Monday morning.

[99] THE COURT: And she didn't mention where in North Carolina she stopped?

THE WITNESS: I think she told me near about the town. I don't recall it, but I think she did mention a town, to be honest.

THE COURT: I don't know whether my question has anything to do with it or not.

MR. PORTER: Could I ask him one other question, Judge?

THE COURT: Let me ask you this question, Mr. Kirks.

THE WITNESS: Yes, sir.

THE COURT: When you went to Madison County, how'd you go?

THE WITNESS: I drove.

THE COURT: What route did you take?

THE WITNESS: I went 33 up into, to be honest with you, I can't tell you the route, but I went up Route 33 through Louisa.

THE COURT: How—when you were on 33—

THE WITNESS: I went up and I made—cut back—

THE COURT: —around Stanley's [100] Store, how close were you to Rockville? Did you—were you on 33 at that point?

THE WITNESS: No, sir. The way I went is up from —from the Courthouse, I went up 54 to Route 33 and then cut back over, and I believe I went—

THE COURT: When you came back, did you go from Madison County to Gilpin Court?

THE WITNESS: No, sir. I believe I went to Gordonsville and cut over.

THE COURT: All right. Now when you came down 64, how close were you to Rockville?

THE WITNESS: I don't ever recall coming back down 64.

THE COURT: Just went over—

THE WITNESS: I went the same way and came back the same way.

THE COURT: All right.

THE WITNESS: I think you could come back that way.

THE COURT: Yes, sir. How close is the Eberwien house to Route 33?

THE WITNESS: Your Honor, I've never been to the Eberwien residence and I don't [101] even—

THE COURT: Oh, I'm sorry, I'm sorry.

THE WITNESS: —I don't even know where it's at.

THE COURT: That's all right. I just knew it was in the general area of Rockville, and Rockvilie runs all the way from Goochland/Spotsylvania. I just was going to put it in the record. Now that is the best sign I know of of a red herring I just dragged through here, and I don't know what it means.

Any other questions now of Mr. Kirks?

MR. CHALKLEY: No, sir. Judge, I would like to introduce, and I know Mr. Kirks is keeping his record on Mr. Sprenkel, a copy of the report from the City of Richmond where the weapons were recovered.

THE COURT: All right, can you get that, Mr. Kirks?

THE WITNESS: Yes, sir.

MR. CHALKLEY: And I have no objection if a copy—

THE COURT: Can we have that or [102] do you want the Clerk to copy that?

MR. PORTER: I'd ask that a Xeroxed copy be used, Judge. I'd have no objection to a Xeroxed copy.

NOTE: The above-referred-to Copy of Richmond Police Department Report was marked and received into evidence by the Clerk as: *Defendant's Exhibit Number 1.*

REDIRECT EXAMINATION

BY MR. PORTER:

Q Mr. Kirks, did you ever have an opportunity to talk to Mr. Sprenkel's family about his activities?

A I delivered the death message to his family after all of this.

Q Did you ever have any conversation with them about whether or not he habitually used Route 33 or any other route to go to Madison County?

A No, sir.

Q Have you had an opportunity to talk to other investigators or people familiar with the [103] Eberwien murder and the circumstances surrounding that murder?

A Yes, I have.

Q And you're familiar with the circumstances surrounding the burglaries you've just testified about, correct?

A Yes, sir.

Q Do you find, or did you find any similarities in those other cases to this case to cause you to characterize or classify the Eberwien murder in your investigation of Chris Sprenkel?

A No, sir.

MR. PORTER: Thank you.

MR. CHALKLEY: Judge, in response, if I may.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. CHALKLEY:

Q What was Mr. Eberwien's physical description, please?

A Mr. Eberwien's?

Q I'm sorry, Mr. Sprenkel.

A (Looking at notes). Let me see. According to his 27 information, he's 5'9", 175 pounds, gray [104] hair, hazel eyes.

Q Did he wear facial hair?
A Yes, he did.
MR. CHALKLEY: Thank you very much.

REDIRECT EXAMINATION

BY MR. PORTER:

Q Officer Kirks, what is your physical description?
A I'm about 5'10½",, 187 pounds, brown hair and blue eyes.
Q Can you account for your whereabouts on January 14?
A No, sir.
Q Did you kill Alice Eberwien?
A No, sir.
THE COURT: The Court is about 5'7" if he's got his shoes on and until he started taking this medicine they've gotten me on now, I was down to about 140; now I'm up to about 187.
Anything else of Mr. Kirks?
MR. CHALKLEY: I have nothing, [105] Judge.
MR. PORTER: No, sir.
THE COURT: All right.

WITNESS STOOD ASIDE

THE COURT: I think that Mr. Porter's motion is well taken, Mr. Chalkley, and I don't know how to admonish you not to do what you want to do. The motion in limine, I can't find any nexus at all to put—
MR. CHALKLEY: Judge, I'll abide by the Court's ruling.
THE COURT: All right, sir. Your motion is granted and you're not to mention Mr. What's His Name.
MR. CHALKLEY: The Court will note my exception, please.

THE COURT: Yes, sir. Are there any other motions?

MR. PORTER: Yes, sir, Judge. I'm sorry that one took so long.

THE COURT: No, sir. It was the Court's fault. It couldn't make up its mind.

[106] MR. PORTER: That's quite all right, Judge. We started the point on this one, this is Number 5, Dana Donovan. Well that's been rendered moot now, Judge, I understand.

THE COURT: I think it has.

MR. PORTER: Yes, sir. So we'll skip over that, skip over Number 6, going down now to Number 7. The Commonwealth intends to introduce evidence of statements made by the deceased, Alice Eberwien, in order to show why family members approached police officers and investigators in the murder trial and why those police officers in turn investigated Mr. Eberwien. And I cite to the Court the case of *Fuller versus Commonwealth*. *Fuller versus Commonwealth*, Judge, was a case where an individual shot a police officer and the police officers, who arrived on the scene to find him laying there bleeding, asked him what happened. And the individual who had been shot said: This person, gave a full description, gave as much information as he could, did. And at trial the investigating officer, who received that information, proceeded to testify verbatim to the description that he received, and the Court held [107] in *Fuller* that that was appropriate, that the fact that he gave detailed descriptions, not offered for the truth or the veracity of the matter asserted therein, did not make them hearsay. Hearsay must be out-of-court statements offered for the truth or veracity of the matter asserted there. And they said that in order to illuminate why individuals acted in the way in which they did that it is appropriate to allow that hearsay testimony when not offered for the truth or veracity of the matter asserted.

I go on to cite *Upchurch versus Commonwealth* and next, my argument would be that the jury should not be required to hear evidence in a disjointed fashion. Where

it is necessary to explain why individuals acted in the manner they did, the statement made to them, when not offered for the truth of the matter asserted, should be allowed. The cases that I cite, *Glodfelter*, *Paddy*, and *Claude* versus Commonwealth, all 1977 cases, make it very clear that it is the fact that such a statement was made and it becomes a fact as opposed to hearsay.

Next, Judge, I argue to the Court that the victim's statements fall within [108] the present sense impression exception to the hearsay rule, and that rule requires that statements the Commonwealth intends to introduce be declarations which explain the victim's actions made contemporaneously with the actions and that they be spontaneous. And that would be the evidence in our case, Judge. She made statements to the family members while under severe emotional distress, broke down and cried that the defendant intended to have her killed. He had told her he was going to have her killed and he was going to make it look like a burglary.

Next, Judge, statements also fall within the state of mind exception to the hearsay rule. They refer to presently existing state of mind with no obvious indication of fabrication or contrivance and the victim's mental condition is relevant to the case. The only thing that the case law, if you look in *Friend versus Commonwealth*, excuse me, Friend on Evidence, Section 238, 533, 1983 Ed. 2d, he very clearly sums up the case law I cite there, *Life Insurance -v- Hillman* and *Newberry versus Commonwealth*, and says the only thing that the Commonwealth, or the Court needs to worry about [109] in order to get statements in under present mind exception is whether or not the state of mind or mental condition of the proponent of the statement is relevant to the case. And here I would say it is, Judge. It's relevant to show intent, it's relevant to show fear, it's relevant to show fear of the defendant, and it goes to the evidence of the condition the body was found in, evidence of the severity of the wounds. It makes her mental condition very ma-

terial to the case. But what I've basically done, Judge, is a three-pronged approach. I've offered it not for the truth or veracity of the matter asserted. Assuming I lose that, I offered as evidence necessary to explain the light under which the investigation was carried out, and then finally, there's present sense impression and state of mind exception. I think that it qualifies under all those exceptions, Judge.

THE COURT: Well when you introduce the statements, will it be through the police officer or through the family member who heard the victim make the statements?

MR. PORTER: Both.

THE COURT: All right. Mr. [110] Chalkley, you respond.

MR. CHALKLEY: Judge, first of all, I think the Court's going to have a very difficult time ruling on these today. It's a matter of relevance. I have no idea what these people are going to say or what the circumstances are under, and neither does the Court.

In regards to the first one, the mere fact that someone in the community or the family said Mr. Eberwien did it is admissible is repugnant to me. I have never in a criminal case asked the defendant—asked the police officer or heard anyone ask a police officer why is Mr. Eberwien here today. I think that's patently obvious to a jury that he's been charged. So why the police picked upon Mr. Eberwien, I submit, is not relevant to any jury. The cases cited, in particular the second one of Mr. Porter, is when an officer responded to a scene because of a burglary alarm. It explains the police officer's action as to why he responded somewhere, what action he took. But just to say somebody said Mr. Eberwien did it, I don't think that's what the case laws is talking about.

In regards to the second one, [111] the present sense, it's hard to respond to because clearly the declaration must be contemporaneous with the act and must explain the act and must be spontaneous. I have no idea

what act we're speaking of nor do I know of what act any witness is going to speak of to that. So it's hard for me to address that, other than if that's present, then obviously it's permissible and in the Court's discretion. But I can't tell you that it is or it isn't based on what I know right now. It's just somebody said this supposedly. I don't know the circumstances or the method or, indeed, even what was said.

In regards to the state of mind, that's clearly not admissible, Judge. Having taken Mr. Friend for the first time in his career, I assure you I'm ahead of him on the law. The Court in *Hansen versus Commonwealth* said the state of mind of a homicide victim is relevant and material only in cases where the defense contends that the death was the result of suicide, accident, or self defense. In those instances, the state of mind must have been communicated to the accused. Well we don't contend this is self defense, we don't contend it's an accident, we [112] don't contend it's suicide. So the state of mind is clearly not admissible.

I believe that addresses Mr. Porter's motions so far as I know at this point.

THE COURT: All right, Mr. Porter.

MR. PORTER: Your Honor, if it please the Court, Judge, I'm prepared to proffer to the Court the circumstances under which the tesimony would come up, if the Court needs that to determine whether or not it falls within—the testimony will fall within one of these exceptions.

First of all, the Commonwealth will have a family member testify that prior to the—well, not about defendant's statements, but about what the victim told the witness, and that would be that the victim approached two family members on two separate occasions prior to the murder and stated to them: Fritz is going to have me killed. I want you to take all the insurance money and have it investigated. I want you to play X music at my funeral and I want you to bury me in this dress. Two

separate family members on two separate occasions prior, [113] approximately a week prior to her murder.

The second statement would be that the victim told family members that the defendant was always talking about how cheap it was to hire a hit man and how he had threatened her with hiring someone to make it look like a burglary, break into their home, and kill his wife. And that was made by her to these other individuals. Now those statements, Judge, the Commonwealth would offer to ask that witness approximately a week before January the 14th: Did you have a conversation with Mrs. Eberwien; yes, I did; what did you do as a result of that conversation? After January 14th when I learned of her death, I approached Investigator Marshall Bailey, Investigator Bob (sic) Schneider, and I told them, you've got to look at Fritz Eberwien. She told me—why did you do that? She told me that he was going to have her killed. That explains their actions, Judge, and it's not offered for the truth of the matter asserted. I'm not going to have one of these witnesses come in here and render an opinion, did Fritz Eberwien kill his wife. That's not the question. It's did you have information in your possession [114] that caused you to go to the investigating officer. Yes, I did. Mr. Investigating Officer, did you have an opportunity to talk to X family member? Yes, I did. Based on that conversation what did you do? I investigated allegations that Mr. Eberwien had threatened to kill his wife prior to her death. That's basically how it would come up, Judge. And in another one, to another family member, going under the exception to present sense impression, prior to the murder, the victim, distraught and near suicide, tearful, pleaded with family members three times to make sure that the point was driven home, in the defendant's presence, I wouldn't put it past him for him to have me knocked off. And then she went on to say, he's going to have me killed. Extremely distraught, and that falls within the present sense impression, Judge. It explains her emotional state.

And it also, Judge, has bearing on the case. This is a defense, obviously, where some unknown, unproveable individual gratuitously finds the Eberwien home and kills an individual that Mr. Eberwien has made his intent very clear he could like to have dead.

[115] I also, Judge, if you move down to Number 8, I think it ties it together, statements made in the defendant's presence. There are other statements that the Commonwealth intends to introduce where, in the defendant's presence, the victim states he is going to have me killed. The one that I just told the Court about in the defendant's presence where she was tearful and near suicide, that was made in the defendant's presence, Judge. Quote: I wouldn't put it past you to have me knocked off, end quote, from Mrs. Eberwien. That was made with family members present, in the defendant's presence, and based on the case law concerning that, the defendant does not deny that. He sits there and is just impassive. And under the case law, that is an admission by conduct, silence or adoptive admission, and it is admissible as if it was a statement made by the defendant. I also argue to the Court that these arguemnts shed light on—Mr. Chalkley has said that the present mind or state of mind exception does not apply, and I disagree with him vigorously. Former threats—I'm reading from the paragraph, middle of the paragraph above number Roman [116] Numerial 8—former threats made by an accused against the deceased are admissible as evidence upon the question of whether the accused, in fact, committed the homicide. That is a case, Judge, *Newberry versus Commonwealth*, that clearly is talking about a homicide, not an accident and not a suicide. A homicide. And it says committed the homicide because they tend to show an intention on his part to do it and, therefore, probability that he did it, *Newberry versus Commonwealth*, 191 Va. 445, 1950.

Finally, in summarizing the case law on that point, Friend on Evidence, evidence of threats and other declarations of intention or design should always be received

unless too vague or remote to be of substantial probative value. Friend on Evidence, Law of Evidence of Virginia, Section 238 at 533, Second Edition, 1983. No qualification whatsoever that it involve a murder or a suicide as opposed to a murder, Judge. And that even goes to malicious wounding cases, if you read these cases and those cites, Judge. And you can't have a malicious wounding if you've go to meet some criteria that it's a suicide. Suicide is a [117] fait accompli, a death.

THE COURT: The statements made by the victim in the defendant's presence and in other people's presence all at the same time together your argument for the admission of those is certainly stronger than the others. All statements that you are talking about having come in, are they all within a week?

MR. PORTER: The most would be two weeks, Judge.

THE COURT: And they would come in first from the—

MR. PORTER: Person receiving—

THE COURT: —family member or—

MR. PORTER: Yes, sir.

THE COURT: The family member. Why would the officer even get in it?

MR. PORTER: Pardon me?

THE COURT: Why would the officer get in it?

MR. PORTER: He doesn't have to, Judge.

THE COURT: I think the further you get away from the original statement the [118] weaker your argument is.

MR. PORTER: He doesn't have to, Judge. If that's the Court's ruling, I'll just limit it to—

THE COURT: No, I'm not ruling yet. I'm trying to find out where we're going.

Mr. Chalkley, do you have any problem with statements of a witness having heard statements of victim in the presence of the defendant?

MR. CHALKLEY: Yes, sir, I do.

THE COURT: All right, sir. Let's go down that road. That's a—

MR. CHALKLEY: Number one, again, and I'm sure Mr. Porter is correct, I think it's a matter the Court's going to have to rule on upon hearing the circumstances under which the statement is allegedly made. Number two, all the case law with tacit admissions or admissions by silence deal with an individual who was accused of committing a crime, not who may do something in the future. *Artis,* 213 Va. 220, *Owens,* 186, 689; *Baughan,* 206, 228, all of them are individuals who are accosted with: You know you sold me alcohol. For some reason, alcohol's [119] big in tacit admission cases. Or in a DUI case, you know the accident happened at 2:15. That's the most recen case from the Court of Appeals on a split decision when both parties to the accident were in the police car and one party said the accident happened at such and such time. I have seen no case, and I'm not telling you there exists no case, but I am aware of no case where somebody says you're going to have me killed or you're going to break into my house and the person has been found to tacitly admit that by his silence. The only cases I have found are where the event complained of has already occurred and, in fact, an accusation of that act is made. So I say there is a difference between this case and—it's not as though a family member told Mr. Eberwien you know you killed your wife—

THE COURT: Yes, sir.

MR. CHALKLEY: —and he says nothing.

THE COURT: Well I do believe circumstances have a lot to do with it because I think that—you know, it's unusual, if you have a close relationship with anybody over a [120] long period of time, that there might have been some statement along there that one was going to do harm to the other. So I think circumstances do have a lot to do with that and that's the reason I asked about the time frame. And I think that circumstances mean a lot, Mr. Porter, of whether it's an isolated event or whether it occurred on several occasions. I don't know how you get to that.

MR. PORTER: It occurred on several occasions, Judge—

THE COURT: Yes, sir.

MR. PORTER: —the same substance of the same threat arising, a hit man, it's easy to have someone killed, he's going to have me killed. It all arose during the context of arguments over whether or not she was entitled to a third of his retirement. And I would have one, two, three, four, five, six witnesses to testify that during a two week, more often during the week before her murder, the one that's two weeks is to one individual, then the others fall within one week prior to her murder, that the victim made statements: I'm afraid of him, he's going to have me killed, and he would make it [121] look like he was at work, he would make it look like it was a burglary. Plus, I have to corroborate that, Judge, testimony that's going to come in about the defendant's own statements about I will have you killed and I will make it look like a burglary. Coming directly from the defendant. I have that, as well. And then I have statements coming directly from the defendant that, you know, it doesn't cost that much to hire someone; you know it's pretty easy to have somebody killed. And then on top of that, once he's confronted with it, he doesn't deny it. He's going to have me killed; he says so all the time. Family members will testify they went to dinner a week before this, lunch a week before this, and that's all he talked about. And then when confronted with it by the victim, he doesn't deny it. And I just—the reason I wrote it in the motion in limine, Judge, is that I know it's going to be a sticky issue. I wanted to get it out of the way to make the trial run smoother.

THE COURT: Yes, sir. Well I think it's going to be a sticky issue.

MR. PORTER: If the Court would like to take the motion under advisement until [122] Friday or tomorrow.

THE COURT: No, I've got too many things under advisement now. I can't get in my house. What bothers

me is that when you get to the point in the trial, it's so different from when you get to the point in y'all telling me what the evidence is going to be and arguing it.

MR. PORTER: Can we just do this—

THE COURT: I'm inclined to go with Mr. Porter on this one, but the whole thing is timing. I think that Mr. Chalkley probably has to make the objection, whether I let you argue about it or whether I'll just rule and we go on. If I rule against Mr. Chalkley, we can just continue on and won't have to take the jury in and out. Because I think he's made enough for the record and we can certainly put something else on the record. If I rule in—if I tend to want to rule in favor of Mr. Porter, I mean in favor of Mr. Chalkley, I might send the jury out so that Mr. Porter can get one last whack at me, is what I'm saying. And both of you have tried enough cases to understand what [123] I'm talking about. So I guess it is taking it under advisement until the trial. I'm inclined to go with Mr. Porter, Mr. Chalkley.

MR. CHALKLEY: Yes, sir.

THE COURT: Lay the good ground work and get it in the right order, Mr. Porter, before it gets before the Court in a skewed position. Anything else we need to take up?

MR. PORTER: That's it, Judge.

MR. CHALKLEY: Yes, sir. Judge, it won't take but a minute. With the Court taking it under advisement, am I correct that it's going to be taken under advisement until such time as the issue arises?

THE COURT: Yes, sir.

MR. CHALKLEY: Are we going to—is the Commonwealth going to be allowed to allude to those statements in opening statement? Because I'm sure if the Court rules in Mr. Porter's favor, he'd like to tell the twelve people as soon as possible.

THE COURT: Yes, sir.

MR. PORTER: Well, Your Honor, I think that in order to get my point across, I can limit what I tell them

to what the defendant [124] directly said. I'll do that to be on the safe side, Judge. I don't want a mistrial.

THE COURT: I think if you phrase it properly—

MR. PORTER: And I don't want to do anything unethical.

THE COURT: No. If you phrase it properly, I'm not saying you can't do it. You know, you get an awful lot in by saying we expect the evidence to show.

MR. PORTER: Yes, sir. Just one last matter, too, Judge, for the—

THE COURT: You may tippy-toe around but I'm not going to limit you. But as in all opening statements, and I don't think Mr. Parcell has forgiven me yet, but on the third time around on that, I struck it on opening statement and told him to go home. He was special prosecutor on one of them out here and he never has liked me since. But that's beside the point. We're all tippy-toeing around and it, you know, we get into the situation and whether it's in opening statement or if it's a question, the way it's asked, the Court might determine that you've crossed the line and [125] declare a mistrial. We're always in that, so I'm not going to limit you in any way in your opening statement. You know better what you ought to do and you know what's coming up, and if you get too far down there, you don't win the point when you get to it. So you're in bad shape.

MR. PORTER: Yes, sir.

THE COURT: All right, what else is left?

MR. PORTER: Just one other thing, Judge. I understand that there's no problem right now with Mr. Chalkley with discovery and we're ready to go forward.

MR. CHALKLEY: I'm not aware of any.

THE COURT: All right. Now the only thing I had was that the computer shows we have a third indictment that apparently is just a rewording of the second indictment.

MR. PORTER: Yes, sir, Judge. What we did, the first indictment for murder did not have malice aforethought. We just indicted over. I told Mr. Chalkley in

advance; he knew about it. So we would just move to nolle prosse the old murder indictment.

[126] THE COURT: All right, so the indictment that says with malice aforethought is the indictment that he's to be arraigned on on trial day.

MR. PORTER: The January 19th indictment, yes, sir.

THE COURT: All right, and the other one was the May 19th indictment which just says wilfull, deliberate, and premeditated. All right, I've got that straight. This is the one that's going to be nolle prossed.

I asked the Clerk to check and to make sure we had enough jurors here. Do you want to put alternates or do you just want to have enough to begin with?

MR. PORTER: Well I—what I would like to do, Judge, is just make sure we have extra, more than what we normally call for a felony case, because—

THE CLERK: We normally call five extra.

MR. PORTER: Five extra?

THE CLERK: Total of twenty-five as a rule.

MR. PORTER: I'd like to call [127] thirty or more, Judge.

THE COURT: Thirty or thirty-five will be fine.

MR. PORTER: Yes, sir.

THE COURT: But do you want to put an alternate in the box?

MR. PORTER: I don't, Judge.

MR. CHALKLEY: No, sir.

THE COURT: We've got no problem there?

MR. CHALKLEY: No, sir, I don't need one.

THE COURT: Maybe in—

MR. CHALKLEY: I don't have any evidence after today, Judge, anyway.

THE COURT: On voir dire, I hate to ask them, it says do you have any problem if this thing goes over for another day.

MR. PORTER: Judge, I'm going to try to move—it looks like I've got a lot of witnesses but most of them

are: State your name, what happened, thank you, pass the witness. I will say that I expect my evidence to go the better part of a day and a half, though.

THE COURT: Yes, sir, I [128] understand that. Yeah, well so far, we don't have anything else set on that day.

MR. PORTER: Judge, can I ask the Court this question? In order to determine the break, because I have some witnesses coming from out of town I'd like to call the second day, can the Court give me a feel for how we're going to—how late we're going to go on the first day?

THE COURT: The only way I can say is I like to go as late as everybody can function because that makes the next day shorter and makes sure we get through the next day.

MR. PORTER: Yes, sir.

THE COURT: And I don't know how to tell you that, but I seldom, if I see a second day coming, I will seldom break for supper and, therefore, if I haven't—if I didn't break for supper, I'm going to keep them here, you know, past eight, nine, something like that.

MR. PORTER: Eight or nine, yes, sir.

THE COURT: If I do break for supper, then I'm talking eleven, twelve, one, you know.

[129] MR. PORTER: Well if we go that long, I can probably get my whole case done in one day, Judge.

THE COURT: Yes, sir, but that's the difference.

MR. PORTER: All right.

THE COURT: I will break for lunch and that'll probably be around one o'clock each day.

MR. PORTER: All right.

THE COURT: But that depends on how the witnesses are going.

MR. PORTER: Well this might cure it a little bit, Judge. We do go so far that my witnesses are mainly my professional witnesses from out of town that I don't want to inconvenience by being here two days.

THE COURT: Yes, sir, I understand that.

MR. PORTER: So if it comes to that, then I can just call them the next day and then I'll have my case over the next morning. If we go late the first day, then I'll just end my case the beginning of the next day with those witnesses.

[130] THE COURT: That'll be fine.

MR. PORTER: All right.

THE COURT: I won't cut you off. I just have problems and civil cases drive me nuts. I'm here at twelve o'clock and we've got one more plaintiff's witness and the defendant's not going to put on any witnesses and says well, I didn't tell the doctor to come until 2:30 and then it's shot my whole day.

If you know we're going to the second day, I can tell you that we will probably go for a late lunch and go into the evening, say, eight to nine and then go home for the evening.

MR. PORTER: And what I can tell the Court is, now knowing who all my witnesses are going to be, say, at seven o'clock I know all I've got left are my professional witnesses, I can let the Court know and we can go home.

THE COURT: Yes, sir.

MR. PORTER: All right.

THE COURT: All right, anything else we need? All right, Mr. Shelton, we don't need any alternate, but have at least thirty-five.

MR. CHALKLEY: Thank you, Judge.

HEARING CONCLUDED

[132]

VIRGINIA:

IN THE CIRCUIT COURT
OF HANOVER COUNTY

Case No. 05-92J&D

COMMONWEALTH OF VIRGINIA

-v-

AVARETTE M. EBERWIEN

TRANSCRIPT of DEFENDANT'S MOTION RE COMMONWEALTH'S MOTION IN LIMINE, DEFENDANT'S MOTION RE COMMONWEALTH'S INTRODUCTION OF DIAGRAM, DEFENDANT'S MOTION TO CONTINUE, and ARGUMENT, in the above, when heard on February 2, 1993, before Honorable Richard H. C. Taylor, Judge, and EVIDENCE AT TRIAL and FINDING, in the above, when heard on that same date, before Honorable Richard H. C. Taylor, Judge, and a Jury.
[138]

FIRST DAY

NOTE; At the calling of the case at 10:17 o'clock a.m., the Court Reporter being duly sworn, the matters are begun, out of the presence of the jury, as follows:

JURY OUT

THE COURT: All right, are we ready to proceed with the trial this morning?

MR. PORTER: Yes, sir, Judge. The Commonwealth's ready.

THE COURT: All right, sir.

MR. CHALKLEY: Judge, if it please the Court, I would have two motions prior to trial.

THE COURT: All right, do you want to argue your motions before or after he's arraigned?

MR. CHALKLEY: Before, if it please the Court.

THE COURT: All right, sir. Go ahead, sir.

MR. CHALKLEY: Judge, if it please the Court, in response to the [139] Commonwealth's motion in limine regarding evidence regarding Chris Sprenkel, since the Court's ruling, the defense has gone back—we've, and if the Court will recall, Mr. Kirks testified Mr. Sprenkel was driving a red Chevy S-10 pickup truck. We now have a witness who on the afternoon of the homicide can place a red pickup truck with white stripes or a white pickup with red stripes outside the Eberwien residence, across the road. In addition, Mr. Kirks has testified that Mr. Sprenkel had facial hair. Mr. Gist, from the Consolidated Lab, can now testify that the ski mask found across the road had a facial hair in the ski mask. Based —I would proffer that for the record, offer that in response to the Commonwealth's motion in limine, and ask the Court to reverse its ruling and allow the defense to put on evidence regarding Chris Sprenkel, as there now is sufficient basis for a nexus to place him at the crime scene.

THE COURT: All right, Mr. Porter.

MR. PORTER: Your Honor, first [140] of all, with respect to the ski mask that was found, the laboratory analysis that was conducted by Elmer Gist with the Bureau of Forensic Science in Roanoke concluded to a scientific certainty that the hair found on the mask was not that of Chris Sprenkel. The Commonwealth had in its possession hair samples from the deceased, Chris Sprenkel, submitted that to the lab, and he concluded that there was no hair, no fiber, no anything on the mask

that could say that that mask was ever either with Chris Sprenkel or in the Eberwien residence. As a matter of fact, Judge, it did have animal hairs on it that could be not identified consistent with something—just as consistent with a theory of a dog dragging it up there or somebody losing it out of their car.

Second of all, Your Honor, Stanley Kirks' testimony was that he was driving a red Chevy S-10 pickup. Again, the Commonwealth's evidence goes beyond that. There may just be somebody else out there with a red Chevy S-10 pickup. This is a rural area. I understand [141] defense counsel not to be saying that he's found exactly a red Chevy pickup truck. He has now found a red truck, any brand, any make, any model, and he's also found a red truck with a very distinct, apparently enough to mention, white stripe running down the side of it. That, again, is not consistent and in no way ties or produces a nexus to put Chris Sprenkel at the residence.

THE COURT: Do you want to respond, Mr. Chalkley?

MR. CHALKLEY: Judge, the only response I have is that it's my understanding that Mr. Gist compared head hair samples of Mr. Sprenkel but did not compare facial hair samples of Mr. Sprenkel. And we're talking about a facial hair that was found in the mask and not head hair. I agree that the head hair did not come back to Mr. Sprenkel. That is what Mr. Gist, I believe, the report says.

THE COURT: How do you respond to that, Mr. Porter?

MR. PORTER: Your Honor, again, [142] all we've got now is nothing more than we had last time when we heard this motion. Now we have a head hair. Where is the nexus—or a facial hair. Where is the nexus to show that that facial hair came from me, came from Mr. Eberwien, from Stanley Kirks? Nothing. From Mr. Sprenkel? Nothing, Judge. It changes absolutely nothing on this case. It could have been anybody's head hair. It provides no nexus.

THE COURT: I'm still having problems with it, Mr. Chalkley, and I don't see any real connection. I don't see where the additional information would change my ruling. And when considered with the rest of the stipulations I heard at the last hearing, I still overrule your motion.

MR. CHALKLEY: Judge, would the Court note my exception?

THE COURT: Yes, sir.

MR. CHALKLEY: Secondly, Judge, defense and its expert were provided way back a diagram done by Mr. McCann, blood spatter expert for the Commonwealth, which directly [143] showed the living room where the homicide occurred and had twenty-one arrows showing a blood spatter direction. Mr. Porter informed me they would be doing a new diagram of the house because some doors changed, told me what those changes would be, and told me they would be doing an overlay which would be consistent with the arrow pattern. Instead of twenty-one arrows now, Judge, the overlay now has eighteen arrows and the arc of the arrows where before it was approximately two hundred degrees has now gone to about two hundred and sixty degrees. I was provided that yesterday. I would either ask that that new chart not be allowed into evidence or defense be granted a continuance for its expert to assimilate the new evidence and go from there.

* * * *

[697] MR. PORTER: Mr. Elmer Gist.

THE COURT: Elmer Gist.

THE CLERK: Do you solemnly swear the evidence you give in the case of Commonwealth versus Eberwien, now before the Court, will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. GIST: I do.

ELMER GIST, JR., called as a witness on behalf of the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PORTER:

Q Sir, would you please state your name and occupation?

A My name is Elmer Gist, Jr. I'm a forensic scientist. I work for the Commonwealth of Virginia, the Roanoke Regional Laboratory, the State Crime Lab System. My specialty of expertise is the area of hair and fiber identification.

Q All right, now—

[698] MR. PORTER: Stipulation as to expertise?

MR. CHALKLEY: By all means.

MR. PORTER: Thank you.

BY MR. PORTER: (Continuing)

Q There's been a stipulation, in order to save time, that you are an expert in your field. Please tell the ladies and gentlemen of the jury, just briefly, what hair and fiber identification does.

A I determine from an examination of evidence whether hairs are present, and if there are hairs present, I determine whether these hairs are human or animal. If they're animal, I can determine the type of animal from which they originated. If they're human, I can generally determine the body area, such as head hair, public hair, limb hair, facial hair, things of that nature. If they are head or public hair, then I can make comparisons between a known sample and unknown sample. In other words, a hair found at an alleged crime scene, I could compare that hair to a hair sample from a person who is suspected of having been at the crime scene. So that's what would be involved with that. As far as fibers are concerned, I can determine whether a fiber is a natural fiber, such as cotton, or whether the fibers are consistent with apparent synthetic fibers or mand-made [699] fibers, and I can compare the fibers, especially the natural fibers. The synthetic fibers I can compare as far as color is con-

cerned. It can determine whether or not various fibers could have originated from a common source.

Q All right, now when you say common source, in order to get these fibers or hairs onto them, do they have to make direct contact or do they have to be in close proximity? What are we talking about?

A It really varies. Hairs and fibers, being very light, can be blown across a desk or a counter just by movement, so that it wouldn't necessarily require a direct contact. But certainly that would encourage the transfer more if it were a direct contact. But clearly a fiber could blow across a room and could land onto your clothing and could reside there.

Q Okay, I'd like to turn your attention to a laboratory analysis, certificates of analysis, dated July the 15th, 1992. Do you have that in your possession?

A Yes, I do.

Q All right, I'd like to ask you, did you conduct a test for fibers on various items and come up with this certificate of analysis?

A Yes, sir, I did.

Q All right, would you please tell [700] the ladies and gentlemen of the jury what items you compared to one another?

A I had submitted to me what was listed as Item 11 which are, quote, hairs and/or fibers, unquote, from a shirt. Another item we labeled as Item 14 which also contained, quote, hairs and/or fibers, unquote, reportedly from blue jeans. And Item 15 contained, quote, hairs and/or fibers, end quote, from a sock.

Q And those items came from Larry McCann of the State Police?

A That's correct.

Q What else did you have submitted to you by Glenn Schneider of the Hanover County Sheriff's Office?

A I had what's listed as Item 21, which was a stocking mask. I had submitted an Item 27, which consisted of, quote, hairs and/or fibers from right hand of Alice A. Eberwien, and then what's listed on my report as Item

28, quote, hairs and/ fibers, unquote, from the left hand of Alice A. Eberwien.

Q All right, I'd like to show you an item that has been previously marked Commonwealth's Exhibit Number 5. Can you identify that as any of the items you tested?

A Yes, this bears a piece of [701] evidence tape that contains the case number assigned to this particular matter in the laboratory, my initials, and item number, and it is the stocking mask that I examined. It is Item Number 21.

Q Thank you. Now those fibers and various things that you compared from a shirt and some blue jeans and some socks and also the stocking mask and then the hairs found from Alice Eberwien's right and left hands and the fibers, were you able to reach any conclusion, comparing those items to that stocking mask?

A Yes, sir.

Q What was that?

A I found that there was no interchange, if you will, of fibers or hairs between the stocking mask and any of the other items that I mentioned.

Q Okay, thank you very much. Are you telling us now that you could or could not place that hat in the Eberwien home?

A There's no indication of any of the hairs or fibers found on these various items being present on that stocking cap. So the only thing I can say is that I was unable to make any association. I cannot, however, rule out the possibility that it was in the home. I can't make that statement. But there are no interchange of fibers which would indicate that it was in the home.

[702] MR. PORTER: Thank you very much. I move to submit the July 15th, 1992, certificate of analysis as Commonwealth's Exhibit Number 39. and that also was previously filed with the Court.

THE COURT: Yes, sir.

NOTE: The above-referred-to Laboratory Report dated July 15, 1992, was marked and received into evi-

dence by the Clerk as: *Commonwealth's Exhibit Number 39.*

BY MR. PORTER: (Continuing)

Q Now, Mr. Gist, I'd like to turn your attention to a July 10th, 1992, certificate of analysis. Do you have that before you?

A June 10th, yes, sir.

Q Excuse me, June 10th. All right, did you have an opportunity to compare several items on that report?

A Yes, I did.

Q Did you get several items from Larry McCann of the Virginia State Police again?

A Yes, sir.

[703] Q What were those items?

A The Item 11, previously referred to, which were, quote, hairs and/or fibers from a shirt; Item 14 which is, quote, hairs and/or fibers from blue jeans, previously referred to; Item 15, also previously referred to as the, quote, hairs and/or fibers from a sock; the Item 21 that was previously mentioned, stocking mask—

Q You got that from Glenn Schneider? 21 you got from Glenn Schneider?

A That's right.

Q All right.

A And then I received a, what we have listed in our report as Item 23, a head hair sample, pubic hair sample, reportedly from Avarette M. Eberwien; what's listed as Item 24, quote, hairs and/or fibers from a nightgown; what's listed as an Item 25, a head hair sample, pubic hair sample, pubic combings, hairs and/or fibers from underpants of Alice A. Eberwien; Item 27, quote, hairs and/or fibers from right hand of Alice A. Eberwien, that was previously mentioned, and an Item 28, previously mentioned, hairs and/or fibers from left hand of Alice A. Eberwien.

Q All right, now I'd like to get your results on the Item 21 that you listed as the stocking mask. What were your results in comparing Item 21 to Item 25 and Item

23? Item 25 would be the hair sample from Alice [704] Eberwien and 23 would be the hair samples from Avarette Eberwien.

A Regarding Item 21, the stocking mask, I found the following: Characteristically Caucasian head hairs which were not consistent with the submitted head hair samples from Alice A. Eberwien, which we had listed as Item 25, or Avarette M. Eberwien, the defendant, were present on the stocking mask. These were hairs that were foreign to both of those sources.

Q All right.

A Characteristically Caucasian head hairs which were not of value for meaningful comparison purposes were also present. Those were hairs that were either too short or had too few characteristics for comparison purposes. In addition, characteristically Caucasian body hairs, such as limb hair, arm hair, leg hair, things of that nature, characteristically Caucasian facial hairs, an animal hair, cotton and apparent synthetic fibers were present.

Q So you're saying that there were hairs from other portions of the body besides the head present on this mask?

A That's right.

Q All right, so you're saying that hairs from, as you said, legs and arms, can reach a mask at some time?

[705] A Sure.

Q All right, I'd like to turn your attention to Item 24, the hairs and/or fibers from the nightgown consistent —consisted of hairs consistent with the head hair from Alice Eberwien.

A That's correct.

Q That's correct?

A Yes, sir.

Q So you're saying there that you got hairs off the nightgown that were consistent with her hair?

A That's correct.

Q All right, would you please tell the ladies and gentlemen of the jury what you noted about several of those hairs?

A Several of the hairs were forcibly removed. That means that they were removed from the scalp with a considerable amount of force, not consistent with a casual combing of the hair. It could have been consistent with a tangled hair in a comb, but, again, it's a forced situation where the active, growing roots are actually stretched and it does cause considerable distortion to a hair and it's, especially in actively growing hairs, it's very characteristic of a haid that has been removed with considerable force, as opposed to a casual combing or brushing [706] of the hair. It's a hair that was removed with, as I said, considerable force.

Q Would you expect to find that considerable force from a tugging or from a shotgun blast?

A I would suspect it's more consistent with tugging of the hair. I don't understand how a shotgun blast could do that. But I clearly don't know as to what the appearance of a shotgun blast hair root would look like.

Q All right, I turn your attention now to Item Number 27, hairs from the right hand of Alice Eberwien. Did you note anything with respect to force on those hairs?

A Those hairs were also, several of them were also forcibly removed.

MR. PORTER: All right, I move to submit as Commonwealth's Exhiibt Number 40 the laboratory analysis dated June the 10th, 1992.

THE COURT: All right, sir, it's so marked.

NOTE: The above-referred-to Laboratory Report dated June 10, 1992, was marked [707] and received into evidence by the Clerk as: *Commonwealth's Exhibit Number 40.*

MR. PORTER: Pass the witness, Judge.

THE COURT: Mr. Chalkley, you have any questions of Mr. Gist?

MR. CHALKLEY: Yes, sir.

CROSS-EXAMINATION

BY MR. CHALKLEY:

Q Good day, Mr. Gist. How you doing, sir?

A Fine, sir, thank you.

Q As I understand it, the hairs on Mrs. Eberwien's nightgown could have come from when she combed or brushed her hair?

A A casual combing or brushing would not distort hair roots of actively growing hairs in a manner that would make them consistent with having been forcibly removed. The only way she would have done this would have been a tangled hair, which would have been more consistent with a comb situation as opposed to a brush. But [708] a tangle where you're pulling the tangle out, then, yes, that could have happened in that fashion.

Q Did you find any of Mr. Eberwien's head hairs on Mrs. Eberwien's hands?

A No, sir.

Q And you noted that there is an animal hair fragment on a sock given to you reportedly from Mr. Eberwien, is that correct?

A I don't know who the sock was from, but I did have hairs and/or fibers from—reportedly from a sock, yes. That's Item 15 on my report.

Q Did you compare that animal hair fragment to the animal hair fragment found on the stocking mask?

A Yes, I did.

Q Were they consistent?

A No, sir.

Q In the stocking mask there were no head hairs consistent with Mr. Eberwien's?

A That's correct.

Q But you did find the facial hair?

A Two.

Q Beard, mustache?

A Beard and mustache, yes.